DOCKET

No. 13-1138
Vide 13-895

Title:	Alabama Democratic Conference, et al., Appellants
	v.
	Alabama, et al.
Docketed:	March 20, 2014
Lower Ct:	United States District Court for the Middle District of Alabama
Case Nos.:	(2:12-cv-691, 2:12-cv-1081)
Decision Date:	December 20, 2013

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 14 2014	Statement as to jurisdiction filed. (Response due April 21, 2014)
Apr 21 2014	Motion to dismiss or affirm filed by appellees Alabama, et al.
May 5 2014	Reply of appellants Alabama Democratic Conference, et al. filed.
May 6 2014	DISTRIBUTED for Conference of May 22, 2014.
May 27 2014	DISTRIBUTED for Conference of May 29, 2014.
Jun 2 2014	PROBABLE JURISDICTION NOTED limited to Question 1 presented by the statement as to jurisdiction. Probable jurisdiction is noted in No. 13-895 limited to Question 2 presented by the statement as to jurisdiction. The cases are consolidated and a total of one hour is allotted for oral argument.
Jul 10 2014	Consent to the filing of amicus curiae briefs in support of either party or of neither party, received from counsel for the appellees.
Jul 22 2014	The time to file the joint appendix and appellants' briefs on the merits is extended to and including August 13, 2014.
Jul 22 2014	The time to file appellees' briefs on the merits is extended to and including October 9, 2014.
Aug 5 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for appellants Alabama Democratic Conferenc, et al.
Aug 13 2014	Joint appendix filed. VIDED. (Statement of costs filed)
Aug 13 2014	Brief of appellants Alabama Democratic Conference, et al. filed.
Aug 13 2014	Proposal of appellant to lodge copies of affidavit of Joe L. Reed.
Aug 18 2014	Opposition of appellees to appellants' lodging proposal.
Aug 20 2014	Brief amicus curiae of the United States in support of neither party filed. VIDED.
Aug 20 2014	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law in support of neither party filed. VIDED.
Aug 20 2014	Brief amici curiae of Professors Ronald Keith Gaddie, et al. in support of neither party

	filed.
Aug 20 2014	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed. VIDED.
Aug 20 2014	Brief amici curiae of North Carolina Litigants filed. VIDED.
Aug 20 2014	Brief amicus curiae of The Brennan Center for Justice at N.Y.U. School of Law filed. VIDED.
Aug 20 2014	Brief amicus curiae of Anti-Defamation League filed.
Sep 4 2014	SET FOR ARGUMENT on Wednesday, November 12, 2014. VIDED
Sep 4 2014	Appellants' reply to appellees opposition to appellants' lodging proposal.
Sep 8 2014	Record requested for U.S.D.C. for Middle District of Alabama.
Sep 9 2014	The Record received from U.S.D.C. for Middle District of Alabama is electronic and located on PACER.
Sep 19 2014	CIRCULATED
Sep 24 2014	Application (14A335) to file a consolidated appellees' brief on the merits in excess of the word limit, submitted to Justice Thomas. VIDED
Oct 9 2014	Brief of appellees Alabama, et al. filed. VIDED. (Distributed)
Oct 15 2014	Motion for divided argument filed by appellants. VIDED.
Oct 15 2014	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae, and for divided argument filed. VIDED.
Oct 16 2014	Brief amici curiae of Speaker of the Alabama House of Representatives and President Pro Tempore of the Alabama Senate filed. VIDED. (Distributed)
Oct 16 2014	Brief amici curiae of Pacific Legal Foundation, et al. filed. VIDED. (Distributed)
Oct 16 2014	Brief amicus curiae of Dalton J. Oldham filed. VIDED. (Distributed)
Oct 28 2014	Reply of appellants Alabama Democratic Conference, et al. filed. (Distributed)
Oct 30 2014	Proposal of counsel for the appellees to lodge copies of the complaint in Figgs, et al. v. Quitman County, et al. VIDED
Oct 31 2014	Motion for divided argument filed by appellants GRANTED.
Oct 31 2014	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae, and for divided argument GRANTED and the time is to be divided as follows: 30 minutes for appellants, 30 minutes for appellees, and 10 minutes for the United States as amicus curiae. VIDED
Nov 12 2014	Argued. For appellants in 13-895: Eric Schnapper, Seattle, Wash. For appellants in 13-1138: Richard Pildes, New York, N. Y. For United States, as amicus curiae: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D.C. For appellees: Andrew L. Brasher, Solicitor General, Montgomery, Ala.
Nov 13 2014	Letter of appellants Alabama Democratic Conference, et al. filed. (Distributed)
Dec 31 2014	The Clerk has approved appellants' lodging proposal of August 11, 2014. Copies of Joe L. Reed's affidavit lodged. (Distributed)
Mar 25 2015	Judgment VACATED and case REMANDED. Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas and Alito, JJ., joined. Thomas, J., filed a dissenting opinion.

JURISDICTIONAL STATEMENT

RECORD AND BRIEFS

13-1138

No. 13-___

IN THE

Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,
Appellants,

v.

THE STATE OF ALABAMA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

JURISDICTIONAL STATEMENT

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March 14, 2014

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QUESTIONS PRESENTED

This appeal in a legislative redistricting case presents issues of law in regard to how a State may rely on race in setting district boundaries. It is undisputed that the State had, among its chief goals, the idea that when possible it would redraw each majority-black district to have the same percentage of black population as the district would have had using 2010 census data as applied to the former district lines. This goal, particularly when combined with the new goal of significantly reducing population deviation among districts, led the State to stark racial intentionality in district-drawing, packing more supermajorities of black voters into already-majority-black districts, without regard to whether such efforts were actually necessary in each district to allow black voters to elect candidates of their choice. A divided three-judge District Court rejected the challenge to this map. This appeal presents issues summarized as follows:

1(a). Whether, as the dissenting Judge concluded, this effort amounted to an unconstitutional racial quota and racial gerrymandering that is subject to strict scrutiny and that was not justified by the putative interest of complying with the non-retrogression aspect of Section 5 of the Voting Rights Act?

1(b). Whether these plaintiffs have standing to bring such a constitutional claim?

2. Whether aspects of the State's map also violated both the purpose and results tests of Section 2 of the Voting Rights Act and the 14th Amendment, through the systematic dilution of minority voting strength and by the elimination of certain majority-minority districts?

PARTIES TO THE PROCEEDING BELOW

Appellants, plaintiffs below, are the Alabama Democratic Conference, Framon Weaver, Sr., Stacey Stallworth, Rosa Toussaint and Lynn Pettway. Rep. Demetrius Newton was also a plaintiff, but is deceased.

Plaintiffs in a consolidated action, who are appellants in No. 13-895 before this Court, are the Alabama Legislative Black Caucus, Bobby Singleton, the Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr.

Defendants-Appellees are the State of Alabama, its Governor Robert Bentley, and its Secretary of State Jim Bennett. Also present as appellees are intervenor-defendants Senator Gerald Dial and Representative Jim McClendon.

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JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANTS ALABAMA DEMOCRATIC CONFERENCE *ET AL.*

Appellants Alabama Democratic Conference, Framon Weaver, Sr., Stacey Stallworth, Rosa Toussaint and Lynn Pettway ("the ADC appellants"), have appealed from the final judgment of a divided three-judge District Court of the Middle District of Alabama, rejecting appellants' challenge to a state legislative redistricting scheme adopted by the State of Alabama. Also pending before the Court is an appeal by other plaintiffs ("the ALBC appellants") from the same judgment, *Alabama Legislative Black Caucus v. Alabama*, No. 13-895. The ADC appellants respectfully ask the Court to exercise jurisdiction, and to reverse either summarily or after briefing and argument.

OPINIONS BELOW

The majority and dissenting opinions of the three-judge District Court, accompanying that Court's final judgment, are reported at *Alabama Legislative Black Caucus v. Alabama*, ___ F.Supp.3d ___, 2013 WL 6726625 (M.D. Ala., Dec. 20, 2013), and are in the Appendix of No. 13-895 at ALBC Jurisdictional Statement Appendix (ALBC J.S. App.) 1-277.

STATEMENT OF JURISDICTION

This matter was properly before a three-judge District Court pursuant to 28 U.S.C. § 2284(a), as it involved a constitutional challenge to a statewide redistricting plan. This Court therefore has jurisdiction over the appeals from the final judgment pursuant to 28 U.S.C. § 1253. Final judgment was entered on December 20, 2013. The ADC appellants

timely filed their notice of appeal on January 14, 2014. ADC J.S. App. 1a-3a.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973c, all reproduced in the Appendix of No. 13-895 at ALBC J.S. App. 458-62.

STATEMENT OF THE CASE

A. Facts

This case concerns a state legislative redistricting plan adopted by the Legislature of the State of Alabama in 2012, following the 2010 census. The following facts are demonstrated clearly by the evidence and, in most instances, even by the majority's findings.

Redistricting was necessary following the 2010 census because of malapportionment of various districts due to population changes. ALBC J.S. App. 17-25. The state experienced and is continuing to experience a relative decline in white population from 71.1 percent in 2000 to 68.5 percent in 2010 and to 66.7 percent in 2011; concomitant growth among minority groups is led by the increase in Hispanic population. ALBC J.S. App. 15; Newton Plaintiffs' Exhibit (NPX) 325; NPX 326; NPX 327. Core minority areas tended to lose total population as black and white residents moved to new areas and black-majority areas expanded into formerly white neighborhoods. Trial Tr. vol. 3, 39-40, Aug. 12, 2013; Defendants' Exhibit (DX) 400; DX 402; DX 406; DX 476; DX 477. Black-majority

districts were under-populated by 2010, but most such districts still had large enough black populations to remain predominantly black even if only white persons were added to meet the two percent deviation standard. Trial Tr. vol. 1, 129, Aug. 8, 2013; Trial Tr. vol. 3, 179, Aug. 12, 2013.

The minority population expansion was most noticeable in Jefferson County (Birmingham), where a black population increase was accompanied by a sharp decrease in white population, ALBC J.S. App. 16; Montgomery County (Montgomery), where organic population shifts had lifted district 73 (27 percent black in 2000) to a 48-44 percent black plurality, NPX 332; and Madison County (Huntsville), where a sizeable black-Hispanic concentration had expanded to dominate a potential Senate district. NPX 302; NPX 340; DX 406; DX 479; DX 480.

Amid the racially polarized voting that all parties agreed marks Alabama elections, black-supported candidates had been elected in 2010 in seven districts with black majorities below 60 percent, including two House districts, 73 and 85, with black population percentages of 48.4 and 47.9, respectively.[1] DX 406. In certain areas, black voters also had for years elected candidates of their choice in coalition districts, notably Senate districts 11 and 22. NPX 324 at ¶¶ 21-22; Trial Tr., vol. 1, 44, Aug. 8, 2013; Trial Tr. vol. 2, 202, Aug. 9, 2013.

The Legislature, pursuant to state law, established a Committee to guide the redistricting process. That Committee consisted of 22 members: 18 white

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[1] The State counts district 85 as a black district, although it has a white plurality, but does not count district 73 as a black district despite the black plurality in that district.

Republicans, 1 white Democrat, and 3 black Democrats. ALBC J.S. App. 26. Senator Gerald Dial and Representative Jim McClendon were chairs of the Committee. ALBC J.S. App. 10.

The Committee adopted a set of guidelines for its work. Notably, the Committee decided that it would seek to dramatically reduce population deviation among districts, below the level that had been accepted in the past; the Committee would accept only a 2 percent variance between the most and least populous districts, whereas a 10 percent variance had previously been deemed acceptable. ALBC J.S. App. 27.

The Committee also described itself as seeking to comply with the Voting Rights Act, and described this (along with the near-equalization of population among districts) as having priority among the various goals (other less-prioritized goals including, for instance, compactness and incumbent protection). ALBC J.S. App. 27-28. The Committee guidelines also mentioned respect for county boundaries, a requirement of the Constitution of the State of Alabama, and other traditional redistricting criteria. Common Exhibit (C-) 1.

The approach to race taken by the Committee, especially through its chairs (Senator Dial and Representative McClendon) and its map-drawing consultant (Randy Hinaman), was in practice and in fact a very particular and striking one. They decided—as part of their putative understanding of the demands of the Voting Rights Act—that Section 5 required that each district should, if possible, be drawn to contain at least as high a percentage of black population, as was present within the "old" boundaries of the district under the 2010 census. ALBC J.S. App. 32-33, 94, 100, 148-51. In other words, because Senate district 26, for example, was 72.69 percent black as of

2010, they would—if possible—draw the new boundaries of Senate district 26 in a way that maintained or increased that black percentage. ALBC J.S. App. 32-33, 94, 100, 148-51; DX 400; DX 402. The Committee and Mr. Hinaman did not consider other minority populations of voting age populations within the majority-black districts, nor did they substantively consider compliance with Section 2 of the Act.

In adopting this remarkable approach, the drafters failed to heed what their own expert counsel had said at a redistricting hearing, about the level of black population that was needed to gain Section 5 preclearance, and about the related evil of over-packing minority voters into supermajority districts:

> In the past it used to be 65 or 65—above 65 . . . I'm pretty sure that if you were to send a district that was 65 percent black to the Department of Justice now, they would wonder why you were packing it, and they'll be looking for, my understanding is, much lower levels. I mean a black majority would certainly be above 50, but 55 may be extreme in some cases.

C-18 at 17.

The State (and the Committee's leadership and consultant) did *not* make any investigation, findings or conclusions about whether such action was actually necessary in order to allow black voters to elect representatives of their choosing in the particular context of Alabama as a whole, or of any district. ALBC Plaintiffs' Exhibit (APX) 75; Trial Tr., vol. 1, 55, 88, 133-34, Aug. 8, 2013; Trial Tr., vol. 3, 148-52, 180-82, Aug. 12, 2013. The drafters' approach—their professed belief that any reduction in the percentage of black population in a majority-black district would

reduce the ability of black voters to elect candidates of their choice—is also rejected by the majority's own finding that "the record evidence is insufficient to support any conclusion about the minimum level of the black voting-age population necessary to allow the black population to elect its candidate of choice." ALBC J.S. App. 107. Rather, the State's approach involved simply the intentional collection of black *qua* black population within the boundaries of majority-black districts on a strict numerical basis. APX 75; Trial Tr., vol. 1, 55, 88, 133-34, Aug. 8, 2013; Trial Tr., vol. 3, 148-52, 180-82, Aug. 12, 2013. As to non-majority districts, the plans fragmented minority concentrations and spread black, Hispanic and Native American population among districts with overwhelming white majorities. DX 400; DX 402; DX 403; DX 406; NPX 323; NPX 373; Trial Tr., vol. 1, 44, Aug. 8, 2013; Trial Tr., vol. 2, 202, Aug. 9, 2013; Trial Tr., vol. 4, 44-45, Aug. 13, 2013.

The plans adopted by the State maintained each of the eight existing majority-black Senate districts. The House plan eliminated one majority-black district and replaced it with a new majority-black district in the enlarged minority concentration of Madison County so as to maintain the number of black districts; however, the House plan also eliminated nascent minority district 73 in Montgomery. ALBC J.S. App. 36-38. That district was moved to suburban Shelby County. ALBC J.S. App. 36-37.

The race-driven nature of the plan drafters' decisions, and the negative impact, are seen starkly in various counties and districts including the following:

* In Montgomery County, Senate district 26 was, and still is, a majority-black district represented by Senator Quinton Ross. The "old" district, as of 2010

census data, was 72.75 percent black. ALBC J.S. App. 42. To meet the newly-adopted 2 percent deviation standard, the drafters added nearly 16,000 persons to that district. ALBC J.S. App. 201. As the dissent pointed out, and is undisputed, even if the drafters had added only whites to the district, it still would have been 64.3 percent black; and Senator Ross would have been comfortable with that percentage or even less. ALBC J.S. App. 201. Even the majority would apparently agree that this was sufficient to allow black voters to elect their candidate of choice. ALBC J.S. App. 185 (noting "the credible testimony of the Chairman of the Democratic Conference, Reed, that majority-black districts in Alabama ordinarily need to be 60 percent black and sometimes 65 percent black."). Senator Dial, a chair of the redistricting Committee, likewise recognized that Senator Ross could no doubt win reelection in a 64 percent black district. Trial Tr., vol. 1, 129, Aug. 8, 2013. Yet the drafters made the astounding decision to add to Senate district 26 only 36 white people—that being the number of people, not a percentage. ALBC J.S. App. 201. Consequently, more than 14,000 black people were newly packed into Senate district 26, raising its supermajority to 75.22 percent. ALBC J.S. App. 43, 202. The drafters even split precincts, going block by block to put the black residents into Senate district 26 while removing white residents who had previously been within the district. ALBC J.S. App. 202. This was the quintessence of race-driven packing.

The packing of Senate district 26 allowed the State to increase the white percentage of adjacent Senate district 25 from 66 percent to over 71 percent in the face of continuing rapid movement of black population into the Montgomery County portion of the district. DX 400. A Montgomery House member, Rep. Jay Love,

objected during redistricting to an alternative plan that would leave Love's district with a 69 percent white majority on the frankly stated grounds that the white majority would drop to 60 percent over the course of the decade. Trial Tr., vol. 3, 42-43, Aug. 12, 2013.

* At the House level, the race-driven line drawing within Montgomery County led to the abolishment of old House district 73, which had become a black-plurality district (blacks, at 48.44 percent at the 2010 census, outnumbered whites who made up only 44.07 percent), and which in 2010 had elected the choice of the black community. ALBC J.S. App. 199-200. As the dissent recounted, Rep. McClendon (a chair of the redistricting Committee) explained the reason why that district was deleted by the new plan: in order to maintain existing percentages of blacks in neighboring districts while increasing their population, the black voters from what had been House district 73 needed to be packed into the neighboring districts. ALBC J.S. App. 199-200 ("As McClendon put it, 'The minority districts in Montgomery were underpopulated' and so '[w]e needed to pick up minorities from somewhere.'").

Each of the majority-black districts in Montgomery County already had sufficient black total population to form a majority in equipopulous districts, as did over-populated House district 73. DX 406. The ADC appellants proposed a map for Montgomery County that would have avoided the elimination of House district 73 (and given that district a black voting age majority population), ALBC J.S. App. 87, NPX 300, but the majority faulted this map because it was not presented as part of an illustrative *state-wide* plan. ALBC J.S. App. 116-18. As explained in the

Argument, imposing this requirement on the ADC appellants was legal error.

* The story is similar with regard to House districts in Jefferson County. The drafters "moved" House district 53 from Jefferson County to Madison County; in other words, they abolished previously-existing majority-black House district 53 in Jefferson County. ALBC J.S. App. 36-38. Thus Jefferson County went from including all or parts of 9 of 18 black-majority House districts, to 8 of 18. ALBC J.S. App. 37-39. Again, the putative rationale was that this was necessary to meet the newly-chosen 2 percent population deviation standard, while maintaining (insofar as possible) the same percentage of black voters in each majority-black district. ALBC J.S. App. 38. Yet, as the dissent noted, citing the testimony of Mr. Hinaman (the State's map drawing consultant), Hinaman "never actually tried to draw nine majority-black districts in Jefferson County, and so could not say how much lower the black percentages would have been; in fact, he believed it *would* have been possible to draw nine such majority-black districts." ALBC J.S. App. 199 (emphasis in original). "Instead of doing so, he concluded that the prospect of lower black percentages in the majority-black House Districts left him no choice: he had to eliminate one of the districts, HD 53, from Jefferson County, relocate it elsewhere, and use its black population to maintain the black percentages in the remaining Jefferson County districts." ALBC J.S. App. 199. He even dug down to the census-block level and split precincts in order to meet the racial-percentage goal. ALBC J.S. App. 103-104.

* The ADC appellants proposed a map for Jefferson County that would have maintained the nine

existing majority-black districts. ALBC J.S. App. 87-88. Again, the majority faulted this map because it was not presented as part of an illustrative *state-wide* plan, ALBC J.S. App. 116-17, and because it did not meet the state's newly-adopted 2 percent population-deviation standard. ALBC J.S. App. 117. As explained in the Argument, imposing these requirements on the ADC appellants was legal error.

* The State's plans fragmented minority populations in Madison County and in Senate districts 11 and 22 so as to avoid and eliminate minority opportunity and coalition districts. In Madison County, the two adjacent majority-black House districts had sufficient minority population by themselves to comprise 44.7 percent of an ideal Senate district, and adjacent areas of that compact black and Hispanic concentration sufficed to comprise a majority-minority Senate district. DX 403. Sen. Dial testified that he was aware of the minority potential but rejected such a Senate district because he believed it would place two incumbent Senators in the same district. Trial Tr., vol. 1, 123, Aug. 8, 2013. Nevertheless, he also testified that he was unaware of, and made no inquiry as to, which two incumbents that might be, and, in fact, no alternative plan would have combined incumbents in such a district. Trial Tr., vol. 1, 123, 127, Aug. 8, 2013.

In the Senate plan adopted by the State, the Madison County minority concentration is fragmented among multiple districts, none as much as 28 percent black. DX 400. Senate district 7 was over 32 percent black and only 60.3 percent white before redistricting, and over-populated by 11,000 persons. DX 402. The new plan lowered the districts' black and Hispanic

population by 11,646 persons and added a net 650 white persons. DX 400.

Senate district 11, which had long elected the candidate of choice of minority voters, was dismantled by the fragmentation of the black concentration of House district 32, which had been part of the core of the district, and by an unnecessary exchange of a large majority black portion of Talladega County with a heavily white and growing suburban area of Shelby County. Trial Tr., vol. 3, 173, Aug. 12, 2013. The new plan lowered the minority voting age population from 34.2 percent to 15.3 percent. DX 400; DX 402. Rep. McClendon, a chair of the redistricting Committee, is now a candidate for the newly-configured district. Trial Tr., vol. 3, 258, Aug. 12, 2013.

Senate district 22, comprising a rural area just north of metropolitan Mobile, did not need to be changed at all. A black-Native American coalition had long and dependably elected their candidate of choice from the area. Trial Tr., vol. 1, 44, Aug. 8, 2013; Trial Tr., vol. 2, 202, Aug. 9, 2013. The district was within one percent of the ideal population and population imbalances within the Mobile area could be resolved by shifts of urban and suburban population among those districts. DX 402. Despite this, the State's plan fragmented the black-Native American coalition, lowered the minority percentage from 34.0 percent to 26.8, and changed the character of the district by replacing rural areas with growing white suburban areas. DX 400; DX 402; Trial Tr., vol. 4, 44-46, Aug. 13, 2013.

Senate district 22 also illustrates race-conscious line-drawing by the wholesale splitting of counties, and even precincts, along racial lines. The Senate district 22 lines split 46 small precincts along racial lines, often leaving tiny "orphan" areas, some with 20

or fewer residents, that the affected counties would have to treat as separate precincts. NPX 323 at ¶ 92. In addition to the financial and other costs associated with splitting precincts, by splitting precincts along racial lines, the State tended to create racially distinct voting places. NPX 323 at ¶ 94. The ADC demonstrated that avoiding such county and precinct splits would have raised the black percentage in Senate district 22 without adversely affecting any other district, and while remaining within the two percent deviation limit. NPX 304.

Other examples of quota-based line drawing abound, as demonstrated by the dissent with citation to indisputable facts and numbers:

> In some districts, the rigidity of these quotas is on full display. HD 52 needed an additional 1,145 black people to meet the quota; the drafters added an additional 1,143. In other words, the drafters came within two individuals of achieving the exact quota they set for the black population, out of a total population of 45,083; those two people represent .004 % of the district. In HD 55, the drafters added 6,994 additional black residents, just 13 individuals more than the quota required, and in HD 56 they added 2,503 residents, just 12 individuals more than the quota required, both out of a total population of 45,071. In the Senate, SD 23 contains 116 more black individuals than were needed to achieve the drafters' quota of adding an additional 15,069 black people, out of a total population of 135,338; in other words, the difference between the quota and the additional black population in the ultimate plan represents .086 % of the district.

ALBC J.S. App. 208-09 (footnote omitted).

The ADC appellants also contend that the plan drafters' rampant and unnecessary county-splitting in violation of a state constitutional command, when combined with Alabama's tradition of powerful "county delegations" in the Legislature, had both the purpose and effect of reducing black voters' power over the legislative fate of local acts affecting largely black counties. In this, for present purposes, we adopt the more extensive discussion in the ABLC appellants' jurisdictional statement in No. 13-895.

In addition to the race-based line drawing and packing discussed above, there are other elements of the plan and of the background facts which add to the strength of the argument that, overall, both the purpose and the effect of the State's redistricting plan was to reduce black voting strength both in terms of districts and in terms of local legislative delegations, to reduce the strength of black minority populations in majority-white counties, and to thwart the growth of coalitions among black voters, Hispanic voters, Native American voters, and reachable white voters. These additional indicia of dilutive purpose and effect are discussed in Section 2 of the Argument below, in order to avoid repetition.

B. Proceedings Below

The proceedings below can be described simply for present purposes. Suit was originally brought by the ALBC plaintiffs (appellants in No. 13-895). ALBC J.S. App. 8. The ADC appellants then brought suit under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. ALBC J.S. App. 9. Our suit was assigned to the same three-judge court that was hearing the ALBC suit, and that court consolidated the cases. ALBC J.S. App. 9. A motion

for summary judgment by defendants was denied, ALBC J.S. App. 11, and the case proceeded to trial.

The majority of the three-judge court (1) dismissed the ADC appellants' racial gerrymandering claim for lack of standing, ALBC J.S. App. 138-40, (2) rejected the racial gerrymandering claim on the merits (reaching that issue because the ALBC appellants did have standing, and also reaching the merits as an alternative to the no-standing holding as to the ADC appellants), ALBC J.S. App. 140, and (3) rejected the ADC appellants' vote dilution claim (which argued that there was dilution both in purpose and effect), ALBC J.S. App. 108-27.

ARGUMENT

I. THE "RACIAL GERRYMANDERING" OR "QUOTA" CLAIM.

As both the majority and the dissent in the District Court recognized, the claims of both the ADC appellants and the ALBC appellants included the argument that the State's redistricting scheme constituted an unconstitutional racial gerrymander, in the sense that those who drew the map did so based on race to an unconstitutional and unjustified degree.

This Court has addressed similar issues before, in *Shaw v. Reno*, 509 U.S. 630 (1993), and cases following *Shaw*. This case, however, is different from most *Shaw* cases, in that the gravamen of the claim here is not that the state went too far to create black-majority districts, enhancing black voting power more than is constitutionally permissible. Here, the claim by black voters and organizations is that the State's racial gerrymandering was to the detriment of minority voting strength, as (among other things) the State

intentionally "packed" large numbers of black voters into black-majority districts, more so than was warranted by the law, and thus not only created the intangible racial-balkanization harms that the *Shaw* line of caselaw decries, but also diluted black voting strength in other districts and in the State overall.

The majority held in favor of the State and other defendants on this point, on both "merits" and (as to the ADC appellants) "standing" grounds. ALBC J.S. App. 7. The "merits" holding raises important issues of law regarding the extent to which a State may intentionally rely on race in redistricting, issues that are of heightened importance as well as complexity after this Court's decision in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). The "standing" issue raises difficult issues of law as well. (However, the court below recognized that the ALBC appellants do have standing to raise this claim. ALBC J.S. App. 34. They have raised it in No. 13-895. Therefore, the District Court's holding about standing, even if correct, would not save the judgment.)

A. On The Merits, This Issue Warrants Summary Reversal Or Plenary Review.

The majority's reasoning on the merits of this claim consisted, in summary, of two conclusions: *first*, that strict scrutiny was not required because reduction of population variance, rather than consideration of race, was the "predominant" motivating factor both for the redistricting scheme as a whole and for certain challenged districts, ALBC J.S. App. 140, 150, and *second*, that even if strict scrutiny was applied, the scheme was constitutional because the scheme (including its goal of trying to maintain the existing percentage of black population in each majority-black

district, whatever that percentage may be in each district) was narrowly tailored to comply with Section 5 of the Voting Rights Act. ALBC J.S. App. 183.

Each of those conclusions is both questionable as a matter of law, and highly important to the continued development of the law of redistricting.[2]

On the question of whether strict scrutiny applies, the majority of the District Court erred as a matter of law by treating the State's effort to achieve some specific standard of population-equalization as a motivation that predominated over race. That view, if accepted, would always defeat every *Shaw*-type claim. Whenever there is legislative redistricting, one thing that has always been accepted everywhere—since *Reynolds v. Sims*, 377 U.S. 533 (1964)—is that districts must meet a standard of near-equality. There is some flexibility about what standard the state may choose; ten percent deviation has often been thought of as the constitutional ceiling, but a state might choose to set itself a tighter standard. Still, whether the state chooses to use the ten percent standard or some other standard, that is always going to be, effectively, number one on the list of considerations.[3] Other considerations—whether (say) political advantage, respect for county boundaries, or

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[2] The legal standard for compliance with Section 5 remains a significant issue, even after *Shelby County v. Holder*, supra. The Court did not strike down Section 5 in *Shelby County*, but instead only struck down Section 4's coverage formula. The Section 5 standard remains in effect, when jurisdictions are covered through the "bail in" method of Section 3.

[3] Very occasionally, as in Hawaii, a chosen standard of acceptable population-deviation may give way to geographic concerns. That exceptional sort of case does not materially detract from the point made in the text above.

racial goals—are always second-in-line behind the state's chosen standard of population equalization (whether the state decides to test the boundaries of what the Constitution allows, or decides to achieve a closer standard of equality).

Indeed, even in *Shaw* itself, there was no allegation that the districts violated the one-person-one-vote doctrine regarding population equality. *Shaw*, 509 U.S. at 636. Thus even in *Shaw*, apparently, the goal of meeting a standard of population-equalization was not subjugated to racial considerations. In *Miller v. Johnson*, 515 U.S. 900 (1995), in listing the considerations to which the State of Georgia had obligated itself in redistricting, this Court listed first "single-member districts of equal population," *id.* at 906; and there was no suggestion that the state had ever jettisoned that goal in service of racial considerations.

This explains why the Court, in *Shaw* and cases following it, has asked not whether the district-drawers allowed race to trump one-person-one-vote considerations. An affirmative answer to that question has never been thought necessary. Instead, the Court has asked whether race trumped "traditional districting principles such as compactness, contiguity, and respect for political subdivisions," *Shaw*, 509 U.S. at 647; *see also Miller*, 515 U.S. at 916 (asking whether "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations"); *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality) (noting "traditional districting criteria such as compactness" and stating that, "[f]or strict scrutiny

to apply, traditional districting criteria must be *subordinated to race*.") (emphasis in original).

In this case, it is clear that—other than meeting a chosen standard for population equalization—race was plainly the predominant factor for those who were drawing the lines. The drafters worked hard to try to make sure that each black-majority district, when growing in population due to the newly chosen population-equalization standard, maintained its prior percentage of black population—even when this meant crossing county boundaries,[4] splitting precincts, and placing incumbents in the same district. Even the majority so found, saying (with misplaced approval), "it makes sense that the 'first qualification' after meeting the guideline of an overall deviation of 2 percent was not to retrogress minority districts when repopulating them." ALBC J.S. App. 149. (Indeed, we submit that the choice of a population deviation standard, lower than required by the *Reynolds* doctrine, was itself part of the plan to reduce black voting power, by packing more black voters into majority-black districts; but the Court does not ultimately need to agree on that point, to agree with us on this gerrymandering issue.)

Thus, on a proper understanding of what it means for race to be the "predominant" factor, even on the majority's findings this plan was subject to strict scrutiny.

This leaves the question whether the plan's use of race was narrowly tailored to compliance with Section 5 of the Voting Rights Act, i.e., avoiding

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[4] The ADC appellants also adopt, agree with, and seek relief upon the county-based theory advanced by the ALBC appellants in No. 13-895.

"retrogression," as the majority concluded it was. As this Court has recognized, "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw*, 509 U.S. at 655.

The majority credited testimony that the drafters "believed that any significant reduction of the black population in the majority-black districts would also likely cause a problem with preclearance of the plans by the Department of Justice," ALBC J.S. App. 175, but that does not save the plan. A state cannot justify a race-based plan with the idea that it was thought to be, or even that it was (as a matter of historical fact) necessary in order to obtain Justice Department officials' preclearance under Section 5; the question is not what Justice Department officials would have said, but what was justified in fact. *Miller*, 515 U.S. at 922-23.

The majority and dissent disagreed about whether compliance with Section 5 will even count, now, as a compelling interest now that Alabama is no longer subject to Section 5 after *Shelby County*, supra. This in itself is an important question that deserves this Court's consideration. The majority took a backwards-looking view, deeming it dispositive that the plan was drawn before *Shelby County*; the dissent disagreed. ALBC J.S. App. 175-76, 267-69. The dissent, we believe, was correct. Districting plans have effect for a decade, between census-driven redistrictings. A plan that would be unconstitutional under current law should not be given ten years' effect into the future, simply because of the state of the caselaw when the plan was drafted.

But even if compliance with Section 5 in Alabama were still a compelling interest, the majority also erred in placing its imprimatur on the plan drafters' belief that Section 5 would *ipso facto*, as a blanket matter, prohibit reduction of the percentage of black population in all black-majority districts. The majority accepted the proposition that any such avoidable reduction—no matter whether it was (say) from 72 percent to 64 percent—would *ipso facto* reduce black voters' ability to elect candidates of their choice and thus violate Section 5. ALBC J.S. App. 180-81, 183. As the dissent explained at length, that reading of Section 5 is mistaken and would raise serious doubt about the constitutionality of the statute. The dissent explained that such locking-in of numbers—without regard to contextual factors that would actually prove what level of population is sufficient to allow minority voters to elect candidates of their choice—is (a) without foundation in the text of Section 5, (b) contrary to the legislative history of the 2006 amendments to Section 5, (c) contrary to the understanding of both the District Court for the District of Columbia and the Department of Justice, and (d) the sort of strict numerical racial quota that would raise very serious constitutional concerns. ALBC J.S. App. 189-90. This, too, is a matter that deserves this Court's consideration.

B. The ADC Appellants Have Standing To Pursue This Claim.

The majority below held that the ADC appellants lack standing to pursue the racial gerrymander (or "quota") claim. This was error.

First, it was error to think of this case as involving only the question whether the individual ADC

appellants, or members of ADC, reside in districts that were drawn to achieve certain racial percentages. That is the sort of "standing" inquiry which this Court has used, in cases involving the drawing of certain particular districts in ways that give rise to only the intangible *Shaw* harms of being racially classified. *Sinkfield v. Kelley*, 531 U.S. 28 (2000); *United States v. Hays*, 515 U.S. 737 (1995). But this Court has not rejected the possibility that there will be other sorts of harm that will support standing, in other sorts of cases based on race-based redistricting that reaches the point of violating the Constitution.

Our case is different from a simple *Shaw* case, as our case involves the contention—and demonstration—that the "packing" of black supermajorities into majority-black districts, to a degree that is unwarranted and unconstitutional, has particular negative effects *not* only on those within the packed districts, but also on black voters outside the packed districts. Let us imagine that, even though the drafters of this redistricting plan were doggedly looking for concentrations of black voters to pack into majority-black districts, the majority were right that it *might conceivably be true* that it just so happened that every member of ADC (a large statewide organization of black voters) was left behind and not swept up in that hunt for black voters. Conceivable, though we respectfully submit it is highly unlikely. Yet it would still have a specific detrimental effect on ADC and its members, who were among the leftover people left behind in districts that were more majority-white than they constitutionally should have been. ADC and its members would then find themselves, fragmented into tinier black populations in super-majority white districts, much less able to "pull, haul, and trade to find common political ground" with likeminded

members of the majority. *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994). To deny standing here, to an organization such as ADC, is to deny that "packing" has harms that go beyond the mere dignitary into the reality and practicalities of politics. The majority failed to inquire whether the unconstitutional race-based plan would affect ADC's (and its members') ability to secure the gains, through the political process, that ADC in particular exists to pursue. Had the majority asked that question, the answer undoubtedly would have been "yes."

Second, as the dissent recognized, ALBC J.S. App. 209-210, n.21, individual ADC appellants Stallworth and Pettway have standing individually, as they resided and voted in former House district 73, which was in Montgomery County. The plan challenged in this case abolished that district, "moving" it (i.e., transferring that district number) to another part of the state. As the dissent explained—citing testimony from Committee chair McClendon—that district was abolished *because of* the plan drafters' racial percentage goal. They were determined to bring more black people into surrounding districts, because, as they increased the overall population levels of those surrounding districts, they (in their view) needed more black people to keep the percentages constant. They found those black people by abolishing House district 73. ALBC J.S. App. 199-200. Thus Stallworth and Pettway have been directly affected by the utilization of unconstitutional quotas; the district in which they used to vote has been abolished because of race. (The majority apparently felt it dispositive that it is unclear whether they are now in a packed super-majority black neighboring district. If they are, then their standing would be clear. If they are not, then they are relegated to being among a smaller minority

of black voters in a majority-white neighboring district, where their ability to influence elections along with black neighbors has been reduced by the overall racial balkanization. Thus they would have standing either way, even if it were necessary to focus only on where they vote now, as opposed to focusing also on the abolishment of their former district.)

At the very least the case presents issues about the law of standing that warrant full review, such that the Court should (as to this claim) carry the "standing" question of jurisdiction with the case for briefing and argument. As the court below recognized, the ALBC appellants do have standing with regard to this claim. They have raised the claim in No. 13-895. The claim is therefore before the Court; and it would be most fair to allow the ADC appellants to participate in regard to that claim as well, and to obtain full review on the question of their standing.

II. THE STATE'S REDISTRICTING PLAN HAD THE PURPOSE AND EFFECT OF DILUTING BLACK VOTING STRENGTH.

As to the vote-dilution claims, the District Court recognized that the ADC appellants do have standing. The rejection of those claims was error on both legal and factual grounds.

The District Court addressed only part of the ADC vote-dilution claim, namely that part concerning the elimination of majority-black House districts in Jefferson County and Montgomery County. ALBC J.S. App. 116-17. It failed to address the broader claim, that by its combination of packing black voters into super-majority districts and also fragmenting the remaining minority population among districts where their votes would be ineffective, the State

intentionally diluted minority voters' opportunity to participate equally in the political process.

As to the latter claim, the District Court erroneously concluded that Section 2 only reached the potential retention of additional majority-minority districts, and not the broader claim of intentional minimization of minority voting strength. The District Court saw, correctly, that the Voting Rights Act does require creation of coalition or other non-majority districts, *Bartlett v. Strickland*, 556 U.S. 1 (2009), and it does not require maximization of minority opportunities. *Johnson v. DeGrandy*, 512 U.S. 997 (1994). It erred, however, in failing to consider whether the intentional elimination of such districts, where adherence to racially neutral redistricting criteria would lead to their creation and retention, violated the Voting Rights Act and the Constitution. Even while deciding that there was no Section 2 obligation to create such districts in *Bartlett*, this Court has recognized that their intentional elimination of districts "would raise serious questions under both the Fourteenth and Fifteenth Amendments", especially amid the intensely race-conscious redistricting by the State. *Bartlett*, 556 U.S. at 24. This is not a case, like *Georgia v. Ashcroft*, 539 U.S. 461 (2003), where minority districts were trimmed to increase black influence in adjacent districts; rather, the State packed and fragmented the minority population in order to eliminate or avoid majority districts and coalition districts alike.

As to the Section 2 results claim, the majority of the District Court rejected these contentions, first, because the ADC appellants did not propose a *statewide* map that included additional majority-black districts in those counties. ALBC J.S. App. 117-18. That is, we proposed maps for those counties in

particular, demonstrating that their black populations were large enough, in each county, for one more black-majority House district than the State had created. However, because the ADC appellants did not propose a state-wide map, the majority indicated that this was fatal at the first step under *Thornburg v. Gingles*, 478 U.S. 30 (1986).

The majority's thinking, apparently, was that we did not show that there could be a map that included more majority-black districts *in total* than the State created. This would be a valid concern, *if* there was reason to think that our proposed districts would have a domino effect that would destroy other majority-black districts that existed in the State map. While this sort of effect could theoretically happen in some situations, the majority erred because there was no reason whatsoever to suspect that it was a likelihood in this case. There is no suggestion that our proposed maps for Jefferson and Montgomery counties necessitated withdrawing black voters from majority-black districts in other counties, or that the alternative districts would not have had effective black majorities.

When a plaintiff shows that additional black-majority districts could be retained or created, it is generally up to the State (or other jurisdiction), not the plaintiffs, to then propose how other districts will work around that. *Perry v. Perez*, 132 S.Ct. 934 (2012); *Wise v. Lipscomb*, 435 U.S. 535, 540 (1978). Thus, for the ADC appellants to have proposed a state-wide map would have been presumptuous and pointless, in the absence of any case-specific fact-based reason to suspect that retaining other majority-black districts would have been impossible. The State, in working up a map that included the ADC appellants' additional

proposed majority-black districts in Montgomery and Jefferson counties, would presumably have done what the State actually did in its own redistricting efforts: start with the majority-black districts, and then work in other districts around them. ALBC J.S. App. 34.

The majority rejected our proposal for Jefferson County, second, because it did not comply with the State's newly-chosen two percent population deviation standard; again the majority deemed this fatal at the first *Gingles* step. ALBC J.S. App. 118. But this was not a legitimate *per se* bar to our proposal, and the majority cited no case supporting the view that there is such a *per se* bar under *Gingles*. The two percent standard is certainly not required by the Constitution. (This Court's recent summary affirmance in *Kostick v. Nago*, No. 13-456, on January 21, 2014, demonstrates that there certainly is no such Constitutional requirement.). A State's choice to create such an unnecessarily stringent standard might be deserving of some weight in the consideration of the totality of circumstances; or, on the contrary, the choice might itself be recognized as having been part of an overall *unlawful* set of choices that dilute minority strength by standing in the way of some constitutionally-permissible majority-black districts. The question would require a degree of nuanced factual assessment that the majority did not give in this case. In any event, each of the illustrative districts was over 60 percent black and had a sufficient black population to retain a substantial black population majority within a two percent or zero deviation standard.

The majority also indicated that, even if the ADC appellants' proposals for Jefferson and Montgomery counties passed the first *Gingles* step, they failed at the "totality of the circumstances" step. This

conclusion—like the conclusion that we failed to prove that the State's *purpose* was to reduce black voting—was tainted by the incorrect conclusion (as discussed earlier herein) that the State was required by Section 5 to pack black voters into certain districts, and that such action was legitimate. In addition, the majority failed to adequately consider or, indeed, even address: (a) the unnecessary and rampant county-splitting, with its impact on black voting strength as discussed by the ALBC appellants in No. 13-895, which raises a suspicion of discriminatory purpose under *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), as it is a marked departure from the redistricting criterion normally given great weight; (b) the evidence of discriminatory animus against black voters in the majority party of the State Legislature, as reflected in a tape-recorded conversation among legislators that was discussed in *Shelby County*, 133 S.Ct. at 2646-47 (Ginsburg, J., dissenting); and (c) the evidence of anti-Hispanic animus in the State Legislature, as reflected in the decision in *Central Alabama Fair Housing Center, et al. v. Magee*, 835 F.Supp.2d 1165 (M.D. Ala. 2011), which is also relevant insofar as the case involved the possibility of a Senate district that would allow a cross-racial coalition of black and Hispanic voters. Ultimately, this Court should at least vacate the judgment below on the dilution issue (both effect and purpose) and remand for further factual consideration.

Although factual findings are viewed deferentially, we respectfully submit that the majority's factual findings on dilution are fatally flawed. To the extent they address the ADC claims, they are rooted in the premise that the race-driven districting discussed in the prior section of this filing was not only lawful but required. Once that faulty premise is removed—i.e.

once one recognizes the race-driven redistricting as highly suspect and indeed unlawful—the rest of the picture (including the parts which the District Court majority did not reckon with) comes into a different focus. We ask the Court to recognize that, upon reversal on the gerrymandering issue discussed earlier in this filing, the appropriate course is a remand for further consideration on the dilution issue as well.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and reverse the judgment of the District Court for the Middle District of Alabama.

Respectfully submitted,

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March 14, 2014

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed 01/14/14]

2:12-CV-00691-WKW-MHT-WHP
(Three Judge Court)

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,

Plaintiffs,

v.

THE STATE OF ALABAMA, *et al.*,

Defendants.

2:12-CV-01081-WKW-MHT-WHP
(Three Judge Court)

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,

Plaintiffs,

v.

STATE OF ALABAMA, *et al.*,

Defendants.

THE ALABAMA DEMOCRATIC CONFERENCE PLAINTIFFS' NOTICE OF APPEAL FROM FINAL JUDGMENT

The Alabama Democratic Conference Plaintiffs,[1] Alabama Democratic Conference, Framon Weaver, Sr., Stacey Stallworth, Rosa Toussaint and Lynn Pettway, hereby notice their appeal to the Supreme Court of the United States, from the December 20, 2013 Final Judgment (Doc. 205) and accompanying Opinion (Doc. 203).

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: January 14, 2014.

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[1] Throughout the litigation, these Plaintiffs were referred to as the Newton Plaintiffs. Representative Newton, lead Plaintiff, passed away after the trial and the Court re-captioned the case as styled above. See Doc. 203; Doc. 205; see Doc. 204, n. 1.

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MOTION

No. 13-1138

In the

Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, *et al.*
Appellants,

v.

ALABAMA, *et al.*
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED (RESTATED)

The Alabama Democratic Conference (ADC) attempts to revive two claims on appeal. The questions relevant to these claims are as follows:

Racial Gerrymandering Claim:

1. Did the ADC establish its standing to challenge the redistricting plan in total or in part as violating the Equal Protection Clause, even though the ADC did not identify any districts in which the ADC's members purportedly reside?

2. Whether, after a four-day bench trial, the district court clearly erred by crediting the testimony of the redistricting plans' drafters and determining as a factual matter that race was not the predominant motivating factor behind the plans?

3. If the district court did clearly err in determining that race was not the predominant factor behind the State's redistricting plans, were the plans nonetheless a narrowly tailored means of complying with the Voting Rights Act?

Vote Dilution Claim:

4. Did the State dilute the black vote by failing to maintain aspects of a previous partisan gerrymander when: (a) a previous legislature had spread black population into majority-white districts in an admitted partisan gerrymander that resulted in disparities in population between districts, (b) there is no way to create an additional majority-black district on a state-wide basis within the standard of population deviation, and (c) the percentage of majority-black districts on a state-wide basis (23% Senate, 27% House) is proportional to the black voting population (25%)?

PARTIES TO THE PROCEEDING

All parties are listed in the jurisdictional statement.

There were two groups of plaintiffs below, and the other group has also appealed in Appeal No. 13-895. The plaintiffs in the two appeals incorporate each others' arguments and some of the arguments in this brief are relevant to the defendants' brief in the related appeal.

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MOTION TO DISMISS OR AFFIRM

The Appellees in this matter—Alabama, its Secretary of State, and the co-chairs of its Legislature's Reapportionment Committee—respectfully ask this Court to summarily affirm the judgment below.

The ADC plaintiffs seek to revive two claims in this appeal, neither of which has legal or factual merit. First, the plaintiffs claim that the State of Alabama's legislative redistricting plans are unconstitutional in their entirety because they were purportedly motivated by racial considerations. The district court gave three reasons to reject that claim, any of which should result in affirmance. Indeed, the district court held a four-day bench trial on this claim and found *as a matter of fact* that race was not the predominant factor behind these plans. Similarly, the U.S. Department of Justice investigated and rejected this claim, preclearing the State's plans under the Voting Rights Act. Second, the plaintiffs claim that the State diluted the black vote by failing to maintain districts that were created by a previous legislature in an admitted partisan gerrymander. This claim fails under the facts and the law.

Summary affirmance is also the right result for equitable reasons; months have passed between the district court's judgment and the plaintiffs' filing of their jurisdictional statement. In the meantime, and pursuant to a settlement entered in another case with the DOJ, the dissenting district judge in this case ordered all candidates to qualify for election in the new districts by Feb. 7, 2014. *See United States v. Alabama et al.*, 2:12-cv-00179-MHT-WC, 2014 WL 200668 (M.D. Ala. Jan. 17, 2014). The parties agreed

to this date so that the State could comply with the timing requirements of the Uniform and Overseas Citizens Absentee Voting Act. Accordingly, candidates have already qualified (or not) to run in the State's new districts, and the State has already begun organizing the ballots to mail overseas for the June primary. The Court should not disrupt this court-ordered and DOJ-approved election schedule because of this fact-bound and meritless appeal.

STATEMENT OF THE CASE

Like their co-plaintiffs in Appeal No. 13-895, the ADC plaintiffs overlook key facts that undermine their claims, including live testimony that the district court expressly credited. Most importantly, the plaintiffs are simply wrong, as a factual matter, when they say that the drafters of these plans were predominantly motivated by racial considerations.

I. The Legislature drew the new maps to strictly comply with federal law.

A few background facts about the Legislature's redistricting effort are important.

A. The Legislature strictly complied with one-person-one-vote, which limited opportunities for manipulation and gamesmanship.

The 2010 census revealed that Alabama's existing districts had become grossly mal-apportioned. Under this Court's precedents, the Legislature had an obli-

gation to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The Alabama Legislature created a redistricting committee that held public hearings at 21 locations in the state, consulted lawmakers of both parties, and hired a redistricting expert to use modern computer modeling. ALBC J.S. App. 30-36.[1] The Committee ultimately developed proposals to redistrict the Legislature, which were enacted in substantial form on party-line votes. They were submitted for preclearance under Section Five of the Voting Rights Act and approved by the DOJ.

After listening to four days of live witness testimony about this process, the district court found as a matter of fact that "the main priority of the Legislature was to comply with the constitutional mandate of one person, one vote." ALBC J.S. App. 142. "[T]he consistent testimony of [the plans' drafters] established that the constitutional requirement of one person, one vote trumped every other districting principle." ALBC J.S. App. 151. *See also* App. 94 (recounting testimony); ALBC J.S. App. 105 (expressly crediting testimony). "Above all," the Legislature's goal was to "create more equality among districts throughout the State." ALBC J.S. App. 144.

To achieve its primary goal of population equality, the Legislature drew new electoral maps with population differences that do not exceed 2%. *See*

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[1] Like the ADC plaintiffs, the defendants cite to the appendix to the jurisdictional statement in Appeal No. 13-895 as "ABLC J.S. App. ___"

ALBC J.S. App. 6. The drafters adopted this 2% deviation figure—which allows for plus or minus 1 percent deviation from the "ideal" district—for essentially three reasons.

First, that deviation represents stricter compliance with one-person, one-vote than the State's last two controversial redistrictings, where the maps allowed deviations of up to 10%. As the lower court explained, the Democrat-controlled legislature in 2001 had engaged in a "successful partisan gerrymander" by using the 10% deviation to "systematically underpopulate[] majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated." ALBC J.S. App. 145. *See* ALBC J.S. App. 17-24 (recounting history of the 2001 gerrymander). The partisan gerrymander meant that, with just 51% of the state-wide vote in 2002, the Democratic Party controlled 71% of the Senate seats and 60% of the House seats. ALBC J.S. App 24. The use of a 2% deviation necessarily "eliminated the partisan gerrymander that existed in the former districts." ALBC J.S. App. 146. It also "reduced, from the outset," the Legislature's "ability to pack voters for any discriminatory purpose, whether partisan or racial." ALBC J.S. App. 144.

Second, the chair of the legislative redistricting committee testified, and the district court expressly found, that "the Committee wanted to avoid future litigation about compliance with the requirement of one person, one vote." ALBC J.S. App. 94. The chair's concerns were well-founded. A three-judge district court in the Eleventh Circuit had previously cast doubt on the presumptive constitutionality of a 10% deviation. *See* J.S. App. 28-29 (discussing *Larios v.*

Cox, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004)). And the Democrats' partisan gerrymander in 2001 had been the subject of controversy and litigation because of population disparities between districts. *See* ALBC J.S. App. 4-5.

Third, the 2% deviation represents the best practices of other States. *See* ALBC J.S. App. 29-30. *See also* ALBC J.S. App. 106-107 (recounting expert testimony about other States' practices). California, Florida, Georgia, Illinois, Indiana, Iowa, Minnesota, Nevada, Oklahoma, Utah, Virginia, Washington, and Wisconsin all used a 2% deviation or less to redistrict one or both houses of their legislatures after the 2010 census. ALBC J.S. App. 30.

The plaintiffs have *never* proposed a competing state-wide redistricting plan with an overall deviation in population of 2 percent or less. *See* ALBC J.S. App. 146. Indeed, even the partial plans they proposed for certain areas failed to meet the 2 percent deviation standard.

B. The Legislature strictly complied with the Voting Rights Act.

The district court also expressly credited the testimony of the plan's drafters that, after one-person one-vote, their next highest goal was to comply with the Voting Rights Act. *See* ALBC J.S. App. 94 (recounting testimony); ALBC J.S. App. 105 (crediting testimony). The Alabama Legislature had to thread the needle between compliance with Sections Five and Two of the Voting Rights Act in order to ensure that the plans were precleared by DOJ and with-

stood any vote-dilution litigation. This was a challenging task for three reasons.

First, because the 2001 partisan gerrymander had systematically under-populated majority-black districts and those districts had also experienced population losses, the majority-black districts were the very districts that needed to change the most. They all needed to "grow" with additional population. *See* ALBC J.S. App. 148 (quoting state senator that "[e]very minority district in this state had lost population and had to grow"). The district court expressly credited "[t]he trial testimony" of the plan's drafters "that the primary reason they added population to majority-black districts was because those districts were severely underpopulated." ALBC J.S. App. 150.

Second, black legislators and other black leaders told the drafters that only districts with sizable black majorities, not bare majorities, would allow black voters to elect their candidates of choice. At least two black legislators, for example, suggested to the plan's drafters that majority-black districts needed to have a black population of at least 62 percent. *See* ALBC J.S. App. 31, 99. Other black legislators proposed changes to their own districts, which were incorporated by the plan's drafters and which created or maintained 60-plus percentages of black voters. *See* ALBC J.S. App. 96. Similarly, Dr. Joe Reed, who has led the ADC since 1970, testified that districts must be at least 60 percent black, and sometimes more than 65 percent black, to allow black voters to elect the candidate of their choice as required by the Voting Rights Act. ALBC J.S. App. 76. *See also* ALBC J.S. App. 165 (expressly crediting Reed's testimony).

In Alabama's previous DOJ-approved plans, the majority-black districts have always had black population percentages in these ranges. *See* ALBC J.S. App. 46-56 (charts comparing black population percentages). In the 2001 plan adopted by the Democrat-controlled legislature, for example, many of the majority-black districts had black-population percentages in the high 60s and low 70s. *See id.* Black leaders told the redistricting committee (and the district court) that these percentages remain necessary because the percentage of black persons in a district does not accurately indicate the percentage of black persons who vote:

> And I just want to say why 62 percent . . . Many times a population of a district is not reflective of the voters at all in the district. Sometimes a lot of people don't vote. Sometimes a lot of people can't vote. They might be in prison or other kinds of institutions. Sometimes a lot of folks are discouraged for one reason or another. So I would hope that 62 percent is a minim[um] for the majority African-American districts.

C-21 p.16 (comments of black legislator at committee hearing).

Third, in 2006, Congress amended Section Five of the Voting Rights Act, which required Alabama to obtain DOJ preclearance of its redistricting plans, to overturn this Court's redistricting decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). In *Georgia*, this Court said that Section Five allows covered States to choose between *either* creating "safe" districts for minorities *or* spreading out minority voters to give them influence in a greater number of districts. *Id.*

at 480. *See generally* Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 Election L.J. 21, 36 (2004). Congress added new language to reject this reasoning and, instead, to affirm the prior practices of DOJ. DOJ had previously held that a plan is illegal under Section Five if the candidate who minorities voted for under the benchmark plan is not *equally likely* to win under the new plan, and Congress adopted that interpretation. *See* 42 U.S.C. § 1973c(b)-(d).

Applying Section Five in the redistricting context before *Georgia v. Ashcroft*, the DOJ declined to preclear plans that reduced, even marginally, the black voting-age percentages in majority-black districts. *See* C-35 (objection letter to Virginia County when black majority reduced from 55.9% to 55.3%). Accordingly, it is undisputed that the drafters of Alabama's plans interpreted Section Five to require them to keep the percentages of minority voters roughly constant in the majority-minority districts so that the candidates supported by those voters were *equally likely* to win. *See* ALBC J.S. App. 175.

C. The plans accomplished the Legislature's objectives and the Department of Justice approved them.

Alabama's plans were successful in complying with the Voting Rights Act. The plans kept the same number of majority-minority districts in the Senate and added an additional majority-minority district in the House. ALBC J.S. App. 36, 46-48. The plans also kept the minority population in each majority-black district relatively stable. Although not identical, the

majority-black districts in the 2010 plan are comparable to the districts in the benchmark 2001 plan, which was drafted by black leaders and approved by the Democrat-controlled Legislature. *See* ALBC J.S. App. 46-56.

The DOJ investigated allegations that the plans were racially motivated and diluted minority voting strength. Numerous witnesses testified that they were interviewed by the DOJ during its investigation, including the principal drafters and opponents of the plans. Similarly, counsel for the plaintiffs sent multiple letters to the DOJ in which they made the same arguments about racial intent and effect that they made at trial. *See* S-DMcCX-454 &455 (letters). But the DOJ rejected these allegations and approved the plans. ALBC J.S. App. 61, 162-63, 183.

The drafters of Alabama's plans also had other traditional redistricting goals in mind, such as minimizing incumbent conflicts and preserving the hearts of existing districts. ALBC J.S. App. 33. They largely succeeded in meeting these goals as well. ALBC J.S. App. 57-58.

II. The 2001 plans' systematic under-population of majority-black districts necessitated state-wide changes.

As explained above, the Democrat-controlled legislature in 2001 adopted a plan that systematically under-populated majority-black districts. The plan allocated excess black population into majority-white districts to create "influence" or "cross-over" districts to help elect white Democrats. *See* ALBC J.S. App. 17-25. Over time, in light of organic population

changes, this intentional mal-apportionment grew worse until the majority-black districts were severely under-populated. The 2010 census revealed that nine of the majority-black House districts were under-populated by more than 20 percent as compared to the ideal district. ALBC J.S. App. 18. Similarly, seven of the eight majority-black Senate districts were under-populated by more than 10 percent, and two more than 20 percent. ALBC J.S. App. 19.

A. The plans moved House districts in Montgomery and Birmingham to maintain black voting power, not dilute it.

The under-population of majority-black districts was the worst in Montgomery County, which includes the City of Montgomery, and Jefferson County, which includes the City of Birmingham. *See* ALBC J.S. App. 36-39.

Under the benchmark 2001 plan, Montgomery County was divided into six House districts, three majority black (76, 77, 78) and three majority white (73, 74, 75). ALBC J.S. App. 37. Districts 78 and 77 were majority-black districts represented by black legislators, and they were respectively the most under-populated (-32.16%) and fourth most under-populated (-23.12%) in the State. ALBC J.S. App. 47. District 73 was a majority-white district with a sizable black population that was represented by a white Democrat named Joe Hubbard. ALBC J.S. App. 35.

Representative Thad McClammy, a black representative from Montgomery, proposed a new map for the area that solved the under-population problem. The map expanded the borders of the under-

populated districts to consume all of the population of District 73, eliminating that majority-white district. ALBC J.S. App. 35. This map was the consensus recommendation of the black legislators in the Montgomery area. ALBC J.S. App. 35. Understandably, Representative Hubbard did not like the McClammy map. But the chair of the redistricting committee rejected Hubbard's counterproposal because, with the McClammy map, "I could make several people happy. With Representative Hubbard's, I would just make him happy." Trial Trans. Vol. 3 at 233, lines 12-23. The drafters also testified that the McClammy map had the beneficial effect of allowing them to draw a new district in the suburbs of Birmingham, which had experienced substantial population growth. *See* ALBC J.S. App. 37.

With some modest changes, the Legislature adopted the McClammy map to redistrict Montgomery County. The approved plan used the population of House District 73 to populate the neighboring districts. The approved plan also extended two additional districts into Montgomery County because those districts needed additional population. App. 118. The plan thus divided Montgomery County into seven House districts—four majority black and three majority white. ALBC J.S. App. 37.

A similar scenario played out in Jefferson County. As in Montgomery County, the majority-black House districts were all grossly under-populated. ALBC J.S. App. 37. In 2001, Jefferson County was divided into nine majority-black districts (52 through 60) and nine majority-white districts. App. 38. Six of the nine majority-black districts were under-populated by roughly 20% or more. ALBC J.S. App. 47. These

nine majority-black districts were collectively under-populated by 76,427 people, which is the population of approximately 1.5 "ideal" House districts. Accordingly, as they did in Montgomery, the drafters used the population of one of the under-populated districts (District 53) to bring the population of the surrounding districts up to the ideal population level. ALBC J.S. App. 38. This plan had the beneficial effect of allowing the drafters to create an additional majority-black House district in the suburbs of the City of Huntsville, where the black population was growing. *See id.*

But, unlike in Montgomery County, certain districts adjoining Jefferson County were grossly *over*-populated. The suburbs of the City of Birmingham extend into Shelby County, which is one of the fastest growing counties in the State. ALBC J.S. App. 37. In the 2001 House plan, all or part of six districts (41, 42, 43, 48, 49, and 50) lay in Shelby County. *See* D-412. These districts were *over*-populated by +60.76%, +6.19% +23.14% +18.73%, +14.26%, and +21.65% respectively. *Id.* Inversely proportional to Jefferson County, these districts had an excess of 63,000 people, enough for more than one additional House district. Accordingly, the drafters used this excess population (and the extra majority-white district that was dissolved in Montgomery) to create an additional majority-white district in Shelby County. *See* ALBC J.S. App. 37.

B. The plans modified various Senate Districts to equalize population.

The ADC's jurisdictional statement mentions Senate districts in Montgomery County, Madison County, Talladega County, and Washington/Mobile Counties. The allegations about these districts come in two types.

First, the ADC alleges that Senate 26 in Montgomery County is a majority-black district that has been "packed" with black voters. J.S. 6-7. Like so many other majority-black districts, Senate District 26 had to grow in population because it was underpopulated by 11 percent. ALBC J.S. App. 152. Although the black-voting-age percentage of the new district is more than 70 percent, District 26 has always had a high percentage of black voters. ALBC J.S. App. 153. In 1993, it was 70 percent black. In 2001, it was 71 percent black. As the district court expressly found, these percentages "evidence[] consistent concentrations of black population in the City of Montgomery," not racial gerrymandering. ALBC J.S. App. 153.

And, far from being an arbitrary gerrymander, District 26's new lines make sense under traditional redistricting criteria. *See* ALBC J.S. App. 152-253. The 2001 plan had split the largely black population of the City of Montgomery between Senate Districts 25 and 26, combining each of those urban populations with sparsely-populated rural areas. The new District 26 follows the old district's lines except that it is more compact; it is now "concentrated in the urban northeast corner of Montgomery County where the City of Montgomery lies instead of stretching

across the entire county to envelop sparsely populated rural precincts." ALBC J.S. App. 153.

Second, the ADC complains that the plans altered "minority opportunity or coalition districts" in Madison County, Talladega County, and elsewhere. J.S. 10. These districts had been gerrymandered in the Democrats' 2001 partisan redistricting to have a large enough black population to increase the electoral chances of a white Democrat, but not enough to establish a black majority. The district court expressly found that the need to equalize population and maintain the population of adjacent majority-black districts necessarily changed these "opportunity" districts. *See* ALBC J.S. App. 39-40, 61-62, 70-74, 79-81, 166-173.

ARGUMENT

I. The Court should summarily affirm the district court's rejection of the racial gerrymandering claim.

The ADC plaintiffs argue that the plans violate the Equal Protection Clause *in their entirety* because they purportedly categorize voters on the basis of race "to an unconstitutional and unjustified degree." J.S. 14. Not even the dissenting district judge below endorsed that argument. *See* ALBC J.S. App. 227 ("With this dissent, I am not saying that the plaintiffs should prevail as to all the districts."). The plaintiffs' state-wide racial gerrymandering claim fails for three reasons that are unique to the facts of this case.

A. The ADC plaintiffs do not have standing, and the ALBC plaintiffs have effectively forfeited this claim.

As a threshold matter, the district court correctly held that the ADC plaintiffs do not have standing to make their state-wide racial gerrymandering claim.[2] To meet the "'irreducible constitutional minimum of standing,'" a plaintiff must show (1) "'an injury in fact,'" (2) "'a causal connection between the injury and the conduct complained of,'" and (3) that a "'favorable decision'" would be "'likely'" to redress the injury. *United States v. Hays*, 515 U.S. 737, 742-43 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). When considering another racial gerrymandering claim, this Court explained that a plaintiff who lives in an allegedly racially gerrymandered district has standing to challenge the denial of equal treatment, but "where a plaintiff does not live in such a district, he or she does not suffer those special harms" and, therefore, lacks standing. *Hays*, 515 U.S. at 745. Unless the record contains evidence that a plaintiff lives within an allegedly racially gerrymandered district, "that plaintiff would be asserting only a generalized grievance," *id.*, which this Court has "repeatedly refused to recognize," *id.* at 743. And when a district court has entered a final judgment after trial, as in this case, these facts "must be supported adequately by the evidence ad-

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[2] The district court also held that the ADC plaintiffs lack standing to make a gerrymandering claim as to any specific district. ALBC J.S. App. 139. The ADC's jurisdictional statement does not attempt to appeal any district-specific claims.

duced at trial." *Id.* (internal quotation marks omitted).

As the district court noted, the ADC plaintiffs did not "clearly identify the districts" where their "individual members" live "under the Acts." ALBC J.S. App. 138. The absence of such evidence in the record is fatal to their assertion of standing. Nor do the ADC plaintiffs attempt to show that they meet the requirements of *Hays*; instead, they argue that "the 'packing' of black supermajorities into majority-black districts" affects black voters everywhere. J.S. 21. This Court has already rejected such an argument:

> The fact that Act 1 *affects* all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean—even if Act 1 inflicts race-based injury on *some* Louisiana voters—that *every* Louisiana voter has standing to challenge Act 1 as a racial classification. Only those citizens able to allege injury as a direct result of having *personally* been denied equal treatment may bring such a challenge, and citizens who do so carry the burden of proving their standing, as well as their case on the merits.

Hays, 515 U.S. at 746 (internal quotation marks and citations omitted).

The ADC plaintiffs make a last-ditch effort to argue that two individual appellants have some limited degree of standing because they "resided and voted in former House district 73," which "was abolished" to populate adjacent majority-black districts. J.S. 22. But as the district court concluded, the plaintiffs failed to show where those individuals live "under the Acts." ALBC J.S. App. 138. Therefore, they have

not shown whether they "were personally subjected to any racial classification *when they were assigned to their districts*." *Id.* (emphasis added).

Finally, the ADC plaintiffs argue that their own standing is irrelevant because the ALBC plaintiffs in Appeal No. 13-895 have standing to bring a racial gerrymandering claim. But the ALBC plaintiffs have effectively forfeited that claim. Unlike the ADC plaintiffs, the ALBC plaintiffs devote only two pages of their brief to their racial gerrymandering claim. *See* ALBC J.S. at 39-40. Most importantly, the ALBC plaintiffs did not challenge as clearly erroneous the district court's express fact-finding that race was not the predominant motive behind these plans. *See* Mot. to Affirm, No. 13-895, at 23-25. The ADC plaintiffs cannot piggyback on the ALBC plaintiffs' standing.

B. The district court's fact-findings are not clearly erroneous.

On the merits, the ADC plaintiffs' racial gerrymandering claim runs headlong into the district court's express fact-findings. District lines are facially race-neutral, and strict scrutiny applies only if race is the "predominant factor motivating the legislature's redistricting decision." *Bush v. Vera*, 517 U.S. 952, 959 (1996) (internal quotations omitted). "In a case such as this one," a plaintiff "must show *at the least* that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and "that those districting alternatives would have brought about significantly

greater racial balance." *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (emphasis added). Here, the district court found as a factual matter—based on four days of live witness testimony—that the predominant purpose of these plans had nothing to do with race, and the plaintiffs have not shown otherwise.

The plaintiffs have not meaningfully argued that the district court's express fact-finding on this front is clearly erroneous. It is amply supported by the drafters' testimony, which the district court expressly found to be credible. It is also supported by the manner in which the Legislature redistricted. As the district court explained, if the drafters had wanted to engage in a race-based gerrymander, they would have used a 10 percent deviation to "pack" black voters into districts by overpopulating those districts. *See* ALBC J.S. App. 145. Instead, they used a tight 2 percent deviation, which "reduced the potential for . . . discrimination, whether in favor of or against a racial minority." ALBC J.S. App. 145. They also slightly *under*-populated the "vast majority" of majority-black districts, which gave the voters in those districts proportionally *greater* representation. The plans also kept incumbent conflicts to a minimum, ALBC J.S. App. 57, kept the districts relatively compact, and preserved the hearts of most existing districts. ALBC J.S. App. 142. This is not the stuff of a state-wide racial gerrymander.

Other aspects of the plans also support the district court's fact-findings. The purported "packing" that the plaintiffs complain about was proposed by black political leaders. Black leaders testified that majority-black districts should generally be more than 60% black to ensure that black voters can elect

their candidates of choice as required by the Voting Rights Act. ALBC J.S. App. 76-77. And black legislators themselves proposed some of the changes that the plaintiffs cite as evidence of packing. ALBC J.S. App. 57-58. Finally, simple arithmetic refutes plaintiffs' claim that these districts "diluted black voting strength . . . in the State overall." J.S. 15. The percentage of majority-black districts on a state-wide basis (23% Senate, 27% House) is proportional to the black voting population as a whole (25%). Accordingly, the plans guarantee that black voters have representation in the Legislature commensurate with their share of the population.

The plaintiffs' only response to the district court is to set up a straw man. Specifically, the plaintiffs argue that "the district court erred as a matter of law by treating the State's effort to achieve some specific standard of population-equalization as a motivation that predominated over race." J.S. 16. The district court's reasoning makes no sense, the plaintiffs argue, because population equalization "is always going to be, effectively, number one on the list of considerations." J.S. 16. There are at least two problems with the plaintiffs' argument.

First, it mischaracterizes the district court's fact-findings. The district court's point was not just that the Legislature's first priority was population equalization as a general matter. Instead, the district court expressly found that the need to equalize population drove the drafters to make the specific changes that the plaintiffs cite as evidence of racial gerrymandering. The drafters "had to repopulate severely underpopulated majority-black districts and depopulate severely overpopulated majority-white districts."

ALBC J.S. App. 152. According to the district court, the evidence established that "the State followed the guideline of an overall deviation of 2 percent, without exception, and then applied the following neutral redistricting principles when feasible: to preserve the core of existing districts; to avoid incumbent conflicts; to draw compact and contiguous districts; and to appease incumbents by accommodating their preferences whenever possible." ALBC J.S. App. 142.

Second, the district court addressed the overall goals of the Legislature because the plaintiffs were challenging those goals. The plaintiffs have always argued that the *entire* redistricting plan is unconstitutional because *one* of the Legislature's overall goals was to "make sure that each black-majority district . . . maintained its prior percentage of black population." J.S. 18. They argued below and on appeal that *this* goal predominated over all other redistricting criteria. The district court's fact-findings merely reflect and reject the plaintiffs' argument.

The district court did not clearly err when it rejected the plaintiffs' contention that the Legislature was predominantly motivated by race. *Cf.* ALBC J.S. App. 163 ("Let us not forget too that the Attorney General of the United States precleared these new districts."). Summarizing the relevant state-wide evidence, the district court explained:

> The Democratic leaders complain about maintaining the relative percentages of black population in districts they designed even after the voters of these districts elected these very Democratic leaders. The Democratic leaders complain of racial unfairness even though black legislators—Senator Rodger Smitherman and Rep-

> resentative Thad McClammy—helped draw the new lines for the majority-black districts. They complain of racial unfairness after they told [the redistricting committee] in public hearings that the majority-black districts need to be at least 60 percent black [under the Voting Rights Act]. . . . To suggest that race is the only dynamic at play here is absurd.

ALBC J.S. App. 162. In light of the evidence presented at trial, it was not clearly erroneous for the district court to find that race was not the predominant motivation for these redistricting plans.

C. The plans pass strict scrutiny.

The district court's effectively unchallenged fact-finding about the Legislature's predominant purpose is enough, by itself, to reject the plaintiffs' claim. But the record also establishes that, to the extent the drafters considered race, they considered race because they needed to consider race to comply with the Voting Rights Act.

First, Section Two of the Voting Rights Act requires the State to create and maintain districts that allow compact racial minorities to elect candidates of their choice. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). Black legislators and political leaders suggested to the drafters and testified at trial that, to comply with Section Two, the black population of a majority-black district must usually be more than 60 percent and sometimes more than 65 percent. The district court expressly credited this testimony. ALBC J.S. App. 76-78. It is also consistent with the case law. *See Texas v. United States*, 831 F. Supp. 2d

244, 263 & n.22 (D.D.C. 2011) (65% "essentially guarantees" compliance with Voting Rights Act).

The dissenting district judge "disagree[d] with those factual determinations" and suggested that some unidentified lower percentage of black voters could comply with Section Two. ALBC J.S. App. 264. But that is contrary to what black political leaders told the redistricting committee and the district court, and it is also contrary to the history of successful Voting-Rights-Act-compliant redistricting in Alabama. As the district court explained, the drafters ensured that their plans would be consistent with the Voting Rights Act by following the example of the 2001 redistricting. The percentage of black voters in each current district "closely resemble[s] the percentages that the Black Caucus endorsed and helped to enact into law only a decennial census ago." ALBC J.S. App. 160. "[T]he plaintiffs offered no credible evidence" that the percentages "adopted only ten years earlier were no longer warranted" to comply with Section Two. ALBC J.S. App. 164.

Second, the drafters attempted to comply with Section Five by keeping the majority-black districts roughly the same as they had been. As explained above, Section Five was amended in 2006 to require covered states like Alabama to ensure that minorities in majority-minority districts have *an equal chance* to elect their favored representative as under the previous districting plan. *See supra* 7-8. Notwithstanding this goal, the State did not keep the percentages exactly the same. "13 House districts and 3 Senate districts have lower percentages of black populations than before," and "there are 5 majority-black House districts below 60 percent under

the new plan in contrast with only 2 majority-black House districts below 60 percent under the 2001 plan." ALBC J.S. App. 159-60.

The plaintiffs assert without any analysis that the district court's "reading of Section Five is mistaken" and that, in fact, Section Five did not require the State to keep black voting power relatively constant in majority-black districts. *See* J.S. 20. As the district court explained, however, the plaintiffs' view is contrary to the amended text, other court cases, and scholarly commentary. *See, e.g,* ALBC J.S. App. 180-81. And it is telling that the plaintiffs would fault the drafters of these plans for attempting in good faith to comply with Section Five of the Voting Rights Act. Section Five applied to Alabama at the time of this redistricting, and the plans secured preclearance from DOJ.[3] It would have been "irresponsible" for the Legislature not to comply with Section 5 because, without preclearance, the redistricting plans would have been unenforceable. *See Vera*, 517 U.S. at 991 (O'Connor, J., concurring). And the plaintiffs cannot seriously maintain that black voters would be better off if the Legislature had ignored the DOJ and intentionally enacted plans that would not have been precleared.

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[3] In any event, the proper interpretation of Section Five is not a legal question worth exploring through briefing and oral argument. In light of the district court's fact-finding that race did not predominate, there is no need for the State to assert compliance with Section Five as a compelling interest to survive strict scrutiny. And the right resolution of this issue is likely irrelevant going forward because no State is currently covered by the 2006 amendments to Section Five.

Finally, although the plaintiffs and dissenting judge call the drafters' target percentages "quotas," they are no more quotas than any other figure that might reasonably be necessary to ensure that a district complies with Section Two or Section Five of the Voting Rights Act. *See* ALBC J.S. App. 215 (defining a "racial quota" as any attempt to "achieve a set percentage of black population"). Indeed, the plaintiffs' theory that all such redistricting targets are constitutionally suspect "quotas" would call into question the constitutionality of the Voting Rights Act and this Court's longstanding interpretation of it. Under this Court's case law, "creating majority-black districts is the core remedy in voting rights cases." Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1428 (1991). Because of the institutional interests of the parties, this case would be an especially bad vehicle in which to explore legal theories that call into question the constitutionality of the Voting Rights Act or would require the Court to reconsider established case law interpreting the Act.

II. The Court should summarily affirm on the vote dilution claim.

The ADC plaintiffs allege two species of vote dilution under Section Two of the Voting Rights Act. Neither raises important legal issues, and no judge in the district court would have ruled in their favor on these claims. *See* ALBC J.S. App. 190 (dissenting judge expressly declining to reach these claims). The first is clearly barred by this Court's precedent and both claims were resolved by the district court based

on the specific facts of this case. The plaintiffs also failed to establish their standing to bring vote dilution claims. As with the racial gerrymandering claim, these vote dilution claims are uniquely suited to summary affirmance.

A. The ADC plaintiffs lack standing to bring a vote dilution claim.

The ADC plaintiffs lack standing to bring a vote dilution claim because they did not show that any of the ADC's members live in the affected districts. *See Hall v. Virginia*, 276 F. Supp. 2d 528, 531-32 (E.D. Va. 2003) (must live in district to bring VRA vote dilution claim); *Old Person v. Brown*, 182 F. Supp. 2d 1002, 1006 (D. Mont. 2002) (same). The district court did not separately address the ADC plaintiffs' standing to bring a vote dilution claim. But its reasoning about their lack of standing to bring an equal protection claim applies *a fortiori* to their standing to bring a vote-dilution claim under Section Two. *See supra* 15-17.

B. The Voting Rights Act does not require the State to maintain "influence" districts created in a partisan gerrymander.

On the merits of their first vote dilution theory, the ADC plaintiffs argue that, by failing to maintain certain aspects of the 2001 partisan gerrymander that favored Democrats, the newly constituted Republican-controlled Legislature diluted the black vote. The former Democrat-controlled Legislature intentionally under-populated majority-black districts

and spread the excess black population to adjacent majority-white districts. The gerrymandered plans created "influence" or "opportunity" districts where the black voting population was large enough to help a white Democrat be elected, but not so large that the black population could elect a black representative. The district court explained that, by equalizing the population between districts, the Legislature necessarily "eliminated the partisan gerrymander that existed in the former districts," which is "why both the Black Caucus plaintiffs and Democratic Conference plaintiffs have challenged the use of an overall deviation in population of 2 percent throughout this litigation and have refused to offer into evidence an alternative statewide plan for redistricting that conforms to this guideline." ALBC J.S. App. 146.

This dilution claim is fundamentally at odds with this Court's precedents. The Court has expressly held that the Voting Rights Act does not require the creation of coalition, influence, or other non-majority districts, *Bartlett v. Strickland*, 556 U.S. 1, 14-20 (2009), and it does not require the State to maximize minority political influence, *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994). But that is precisely the relief that the plaintiffs seek. They would read the Voting Rights Act to *compel* what this Court has held that it *allows*—"spreading out minority voters over a greater number of districts" to increase the number of elections that they influence. *Georgia*, 539 U.S. at 481. This Court rejected that claim just a few years ago when it held that Section Two "does not mandate creating or preserving crossover districts." *Bartlett*, 556 U.S. at 23.

The district court also rejected this claim based on the facts of this case. The plaintiffs assert that the district court "failed to address" their argument that the "combination of packing black voters into super-majority districts and also fragmenting the remaining minority population among districts" diluted the black vote. ALBC J.S. App. 23. But the district court expressly discusses this claim over three pages of the appendix. *See* ALBC J.S. App. 119-22. Even assuming that the law supported this kind of dilution claim, the district court rejected it because the ADC did not support it with evidence. The ADC's leader testified that majority-black districts must be at least 60 percent black under Section Two, but the ADC "failed to present any evidence of how the Legislature could have drawn, in a statewide plan, the same number of majority-black districts with 60 or more percent black voters in those districts with an overall deviation in population of 2 percent while still increasing the number of influence or crossover districts." ALBC J.S. App. 122.

Finally, the district court explained in granular detail that these contested influence districts were altered for population equalization and to preserve communities of interest. *See* ALBC J.S. App. 166-173. The plaintiffs do not argue that these findings are clearly erroneous; they simply ignore them. For example, the plaintiffs state that Senate District 22 "did not need to be changed at all." J.S. 11. But the district court found that Senate District 22 "bordered several severely malapportioned districts" and "the need to bring the neighboring districts into compliance with the requirement of one person, one vote served as the primary motivating factor for the

changes to District 22." ALBC J.S. App. 170. The drafters had to change District 22 because there was nowhere else to find population. A "practical, geographical feature . . . materially restricts redistricting options in Mobile County;" it borders the Gulf of Mexico to the south and east and the State of Mississippi to the west. ALBC J.S. App. 171.

Ultimately, the plaintiffs are arguing that the State must, as a matter of federal law, manipulate the populations of districts to preserve specific features of a previous partisan gerrymander. *Cf.* ALBC J.S. 161 (noting that "three white Democrats" who represent influence districts "testified in support of the plaintiffs' complaints"). That result would be contrary to the law and the facts. As the district court put it, "[n]othing in Section 2 of the Voting Rights Act would require the State to adopt a higher population deviation and a less equal system for the election of its representatives to give minorities a *better* opportunity than other members of the electorate to participate in the electoral process." ALBC J.S. App. 114 (emphasis added).

C. The plaintiffs never established that an additional majority-minority district could be created, and the district court did not clearly err in weighing the totality of the circumstances.

The plaintiffs also made a traditional Section Two claim that the purpose or effect of the plan was to dilute the black vote. That claim required the plaintiffs to identify additional majority-minority districts that the State could have created, and the plaintiffs

failed to do so. But, even had they done so, the district court found as a factual matter that the plans do not dilute the black vote.

First, as the district court held, the plaintiffs did not meet the first *Gingles* factor to establish a *prima facie* case of vote dilution. *See Gingles*, 478 U.S. at 50-51. "A plaintiff claiming vote dilution under § 2 must initially establish that: (i) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district . . ." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (internal quotation marks omitted). "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *De Grandy*, 512 U.S. at 1008. No one has ever proposed a state-wide redistricting plan that would create an additional majority-minority House or Senate district. Instead, the ALBC plaintiffs' proposed a state-wide plan that "actually create[s] fewer opportunities for black voters to elect the candidates of their choice." ALBC J.S. App. 112.

For their part, the ADC plaintiffs have never proposed a state-wide plan of any kind. Instead, the ADC plaintiffs erroneously argue that they met their burden by proposing county-specific maps that create one additional majority-minority House district in Jefferson County and one additional district in Montgomery County. J.S. 25.

The district court properly rejected those county-specific maps. Obviously, anyone with the right software can draw districts in a single county; the chal-

lenge is to include them in a plan to redistrict the entire state. *See* ALBC J.S. App. 117. The plaintiffs concede that "[t]his would be a valid concern, if there was reason to think that our proposed districts would have a domino effect" and undermine other districts. J.S. 25. But the plaintiffs ignore the district court's express fact-finding that there would be such a domino effect. The district court found that the State's plans "include[] several House districts that cross into Jefferson County" such that "a new plan for Jefferson County cannot be simply inserted into the state plan" without affecting those districts.[4] ALBC J.S. App. 117. Similarly, the district court expressly found that the plaintiffs' proposal for Montgomery County was insufficient because the State's plan "brought an additional majority-black House district, District 69, into Montgomery County" and the plaintiffs could "not account for the domino effect that [their] plan could have on District 69 or the other neighboring majority-black districts." J.S. 118.

Second, even if plaintiffs had met all the steps of *Gingles*, the district court did not clearly err in evaluating the totality of the circumstances. If a plaintiff establishes the *Gingles* factors, it must then prove that "the totality of facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity." *De Grandy*, 512 U.S. at 1013-14. Here, the 2012 Senate and House plans provide minority voters with roughly proportional representation, which is "a relevant

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[4] The district court also rejected the ADC's proposed map for Jefferson County because it continued to systematically underpopulate the proposed majority-black districts by up to 5%. *See* ALBC J.S. App. 117.

fact in the totality of circumstances." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 436 (2006) (internal quotation marks omitted). According to the 2010 Census, the voting-age African-American population of Alabama is about 25% of the total voting-age population. The Senate plan creates 8 majority-black districts, or 22.9% of the total of 35, and the House plan creates 28 majority-black districts, or 26.7% of the total of 105.

The plaintiffs do not discuss proportionality at all, and they muster almost no other evidence in support of their claim. They incorporate the arguments of the ALBC plaintiffs about county-splitting, although county-splitting is a race-neutral feature of all redistricting plans. *See* J.S. 27. And they cite to unrelated judicial decisions. For example, they say the "anti-Hispanic animus in the State Legislature" is reflected in *Central Alabama Fair Housing Center, et al. v Magee*, 835 F. Supp. 2d 1165 (M.D. Ala.), *vacated* by 2013 WL 2372302 (11th Cir. 2013). But the district judge in that vacated decision found a likelihood of anti-Hispanic animus based largely on "derogatory comments about Hispanics" made by *black legislators*. *Id.* at 1193-94 (quoting statements by Reps. Rogers and Jackson). That decision does not support the plaintiffs' notion of a "cross-racial coalition of black and Hispanic voters" that warrants a Section Two remedy. J.S. 27.

The district court, on the other hand, cited "overwhelming evidence in the record" that establishes "that black voters have an equal opportunity to participate in the political process the same as everyone else." ALBC J.S. App. 127. Black voters are politically active in Alabama and "have successfully elect-

ed the candidates of their choice in the majority-black districts." ALBC J.S. App. 125. Although the district court recognized Alabama's shameful history of racial discrimination, "the record contains no evidence of racial appeals in recent political campaigns in Alabama or of a significant lack of responsiveness to the needs of blacks." ALBC J.S. App. 125. On the contrary, the very Montgomery County redistricting plan that the plaintiffs challenge as diluting the black vote was proposed and supported by the area's black legislators. The district court's ruling on the plaintiffs' vote dilution claims should be summarily affirmed.

CONCLUSION

The Court should summarily affirm the judgment of the district court.

Respectfully submitted,

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April 21, 2014

REPLY BRIEF

No. 13-1138

IN THE

Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,
Appellants,

v.

THE STATE OF ALABAMA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF OPPOSING APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

This case raises important issues of the role of race in legislative redistricting. Appellees (who will be referred to herein as "the State") have not shown that this Court clearly lacks jurisdiction as a matter of "standing," or that the merits questions presented are insubstantial. Accordingly, Appellants ask that this Court deny the motion, and postpone consideration of jurisdiction until a hearing of the case on the merits pursuant to Rule 18(12).

The State argues for affirmance as an "equitable" matter because, after the Judgment, qualifying for elections under the State's districting map closed in early February. Appellees' Joint Motion to Dismiss or Affirm (Joint Motion) pp. 1-2. This is no basis for affirmance. Even if Appellants had rushed the filing of their Jurisdictional Statement, the case would not have been ripe for this Court's consideration by early February; so we bear no "equitable" fault. In any event, "equitable" considerations would not justify affirmance, because the progress of the present election cycle by no means makes this case moot. The dispute about the present districting map will still matter for future elections, including any interim elections and the next cycle of legislative elections in 2018.

As shown in the Alabama Democratic Conference (ADC) Jurisdictional Statement, this appeal has two components: the "racial quota" or gerrymandering claim, and the dilution claim. The State has not shown that dismissal or affirmance is appropriate on either claim.

I. The "Racial Quota" or "Gerrymandering" Claim.

A. Substantial Questions Are Presented on the Merits.

Two factual points can be taken as common ground at this point. First, the State did decide to attain a stricter standard for population equalization among districts than had been utilized before. (The parties dispute whether that goal itself was adopted as part of the overall goal of reducing black voting strength, but as we have shown, Appellants can prevail even without prevailing on that issue.) Second, aside from that population-equalization standard, the State's foremost goal was to maintain or increase, as nearly as it could, the percentage of black population in each "black" district—no matter how high that percentage was, and no matter whether it was actually necessary in order to allow black voters to elect their candidate of choice. As the State does not dispute, the first stated qualification after meeting the guideline of an overall deviation of 2 percent was to maintain or increase th black total population in each district the State d fined as majority black.

The State contends that the stricter population-equalization standard reduced the opportunity for race-based gerrymandering. Joint Motion, p. 18. But the facts show that—especially in this era where highly specific geographic and racial data are available and utilized—there was ample opportunity for race-based line drawing, and that the State actively took advantage of that opportunity. *See* ADC Jurisdictional Statement, pp. 7, 11-12 (reflecting multiple instances in which the State's district-drawers drilled down to a very deep "block" level, splitting precincts, in order to draw districts according

to race and to maintain or increase black population supermajorities).

The State contends that it wins, *ipso facto*, because it ranked the population-equalization standard just higher in priority than racial considerations. But there is (to say the least) a substantial question whether this is a legitimate defense to a racial gerrymandering claim. As shown in the ADC Jurisdictional Statement (pp. 16-18, citing, *e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993), *Miller v. Johnson*, 515 U.S. 900 (1995)), this Court's prior caselaw at least strongly suggests that a plaintiff does not have to prove that one-person-one-vote considerations were subordinated to race, in order to prevail on a racial gerrymandering claim. The State, rather than responding substantively to this discussion, whistles past it without addressing the caselaw that Appellants cited. Clearly there is a substantial question here, worthy of plenary consideration, even though the State would prefer to avoid it.

The State also contends that its highly race-conscious action would survive strict scrutiny review because it was thought necessary to comply with Section 5. But here again, the State ignores rather than confronts the caselaw cited in the ADC Jurisdictional Statement. For instance, the State contends that its race-based actions were necessary in order to obtain preclearance. Joint Motion, pp. 8, 23. Even if this were true, this Court has held that what matters is not what the Department of Justice would have demanded, but what the law actually demanded. *See Miller*, 515 U.S. at 922-23, discussed in ADC Jurisdictional Statement, p. 19. Did Section 5 actually require that the State maintain the same percentage of black population as much as possible, no matter

what percentage that was or whether it was necessary in fact to protect minority voting power, or whether (in fact) it actually reduced overall minority voting power through a "packing" effect? The advice of the State's own redistricting expert was that it would constitute packing. ADC Jurisdictional Statement, p. 5. As reflected in the split in the District Court, this is (to say the least) a substantial question.

In what can only be described as a bomb-throwing or *in terrorem* argument, the State suggests that if Appellants are correct, then by the same token all relief under Section 2 or Section 5 would be equally unconstitutional. Joint Motion, p. 24. That argument is absurd. In the first place, and unlike in other areas such as hiring and college admission decisions, redistricting simply cannot be race-blind. Legislators, familiar as they are with population and voting patterns, draw their own districts, and the racial composition of the district can determine their own chances of reelection. When considering whether it is constitutional to take account of race in redistricting, the law is—and always has been—sensible enough to recognize a distinction between what is reasonably necessary to make voting fair, and what is not. Here, the core of the problem is that the State did not make any inquiry into whether packing black voters into districts, at the block-by-block level, was necessary as a matter-of-fact to protect fair voting strength. The State truly was using quotas as quotas, not using percentages that were justified by facts and practical assessment.

B. Substantial Questions Are Presented as to Standing.

As expected, the State takes the simplistic view that these Appellants have no standing to raise this claim

under *United States v. Hays*, 515 U.S. 737 (1995). But as shown in the ADC Jurisdictional Statement (pp. 20-23), there are substantial questions about this on multiple grounds.

First, there is the fact that this is not merely a case like *Hays* that objects to classification *simpliciter*. Here, the classification harms ADC, its members (including individual plaintiff Pettway), and the individual plaintiffs by reducing overall black voting strength. This is the nature of packing: it causes harm in practical effect to all minority voters whether they are among those who are packed or are among the fewer who are left behind in fragments with less power to "pull, haul, and trade to find common political ground" with likeminded members of the majority. *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994). There is, to say the very least, a substantial question whether *Hays* rejected this type of practical-injury standing. This type of standing is especially important here, where Appellant ADC is undisputedly a statewide organization with members in every county and endorses candidates in virtually every legislative race. It is also key in a case like this one that contains a racial vote dilution claim.

Second, the State points to no case where this Court has decided whether individuals have standing on the basis of the sort of facts that affect individual Appellants Stallworth and Pettway. Their former majority-black district was abolished, in pursuit of the State's race-driven redistricting. ADC Jurisdictional Statement, pp. 22-23. This constitutes a specific and cognizable injury to them, directly traceable to the State's challenged use of race. *Hays* does not address this sort of situation.

Third, the ADC has standing because it suffers organizational harm from the redistricting beyond the harm to its legislative efforts, including the need to expend additional resources on voter education and turnout due to the willy nilly county and precinct splits. See, e.g., Trial Tr., vol. 2, 168-69, Aug. 9, 2013. Such a diversion of resources is sufficient for organizational standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). These arguments are sufficiently substantial, that this Court should postpone consideration of standing for full review along with the merits.

II. The Vote Dilution Claim.

A. Substantial Questions Are Presented on the Merits.

The racial classification issue is intertwined here with the claim under the purpose prong of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. This case presents a substantial issue as to the proper application of the standards for determining whether a redistricting plan was adopted with a racially discriminatory purpose.

The existing judicial framework for assessing purpose was set forth in *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1997). Among the indicia of an invidious purpose is a "substantive departure[]. . . [from] considerations usually considered important by the decision-maker." 429 U.S. at 267. The State admitted that adherence to the Alabama Constitution—which forbids the splitting of any county boundary in the creation of a Senate district and restricts the splitting of counties by House districts—is an important governmental interest. Both plans routinely split

counties when doing so was unnecessary under either federal law or the legislatively imposed two percent deviation standard. ADC Jurisdictional Statement, p. 13; see generally ALBC Jurisdictional Statement. And the county splits disadvantaged minority voters through the State's block-by-block packing and fragmenting minority populations. *Id.* The District Court focused exclusively on the legal questions raised by the ALBC respecting county delegations and addressed by them in their Jurisdictional Statement. It ignored their functional interest—the traditional role which "strongly favored a decision contrary to the one reached" by the Legislature, 429 U.S. at 267, and failed to confront them under the *Arlington Heights* framework. The District Court's failure to recognize the legal significance of the departures from both the state constitutional interest and the long-standing functional interest in maintaining county boundaries is at odds with the decisions of this Court including, most recently, *Tennant v. Jefferson County Commission*, 133 S.Ct. 3 (2012), and merits full review.

The District Court further erred in its *Arlington Heights* analysis in failing to recognize the legal significance of the overt expressions of racial hostility during the legislative process, as in ignoring the significance of a white legislator objecting to having more black voters in his district, and the immediately preceding period as in the candid slurs, hostility and stereotypes captured in *United States v. McGregor*, 824 F. Supp.2d 1339, 1345-47 (M.D.Ala 2011) (which, perhaps understandably, the State fails to address). The District Court's approach to the issue of "contemporary statements by members of the decision-making body," 429 U.S. at 268, evincing discriminatory intent merits full review by this Court.

Just as vivid, if less crude, evidence of a racially discriminatory purpose was the manipulation of district boundaries within Montgomery County. Senate district 26 was 72 percent black and needed additional population. Appellees did not dispute that the existing black super-majority was not needed, that black voters could elect (or re-elect) the Senator of their choice with a lower percentage—even with the 64 percent majority that would have resulted by adding only white voters to the district. The incumbent, Sen. Ross, testified that he would welcome a lower black majority (50, 55 or 60 percent) in the district and criticized the corrosive effects of racial super-majorities, black or white. ALBC J.S. App. 201. The State's plan for district 26 went block by block, splitting numerous voting precincts, to add black persons to Senate district 26 and exclude white persons. The net effect was to add 15,785 persons to Senate district 26, but only 36, or 0.02 percent of whom were white. That racial imbalance is extraordinary, approximately 50 times as one-sided as the racial gerrymander in *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (evidence "irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation [was] solely concerned with segregating white and [black] voters."). The District Court dismissed these facts, noting that the Senate district 26 increase to over 75 percent black was "unremarkable," ALBC J.S. App. 152. The District Court's approach to these prongs of the *Arlington Heights* analysis presents a substantial question meriting this Court's full review.

B. There Is No Basis for Summary Dismissal Based On Standing.

The District Court did not question these Appellants' standing to raise the intentional dilution claim. This was clearly no oversight, but was instead surely based on the sense that standing was so clear that it required no discussion. This must be the case, because the District Court did address these Appellants' standing specifically as to the quota or gerrymandering claim (incorrectly finding a lack of standing). The District Court was attuned to standing issues. Its failure even to suggest that there was a potential problem on standing as to the dilution claim clearly manifests the understanding that there was no problem worth talking about.

The State attempts to import its simplistic understanding of *Hays* standing, not only from the pure-*Shaw* sort of case to the more practical-injury gerrymandering claim we have discussed above, but even to all vote dilution claims. This is not a step that this Court should consider taking without full deliberation. The very nature of dilution, we submit, mandates a sensitive inquiry into the practical effects on the individuals as well as an organization like ADC. A statewide scheme to dilute black voting power will, in practical terms, hurt all plaintiffs such as these—perhaps ADC most obviously, as an undisputedly statewide organization that is involved in House and Senate races across the State.

CONCLUSION

For the reasons explained herein and in the ADC Jurisdictional Statement, this Court should deny Appellees' Joint Motion to Dismiss or Affirm, and should postpone consideration of jurisdiction until a hearing of the case on the merits pursuant to Rule 18(12).

Respectfully submitted,

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May 5, 2014

JOINT APPENDIX

Nos. 13-895, 13-1138

In The
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,

Appellants,

v.

ALABAMA, *et al.*,

Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,

Appellants,

v.

ALABAMA, *et al.*,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

JOINT APPENDIX

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Appeal Docketed, No. 13-895, January 23, 2014
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The following opinions and judgments have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Jurisdictional Statement, *Alabama Legislative Black Caucus, et al., v. Alabama*, 13-895, filed January 23, 2014

APPENDIX

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2012 WL 6706665 (M.D. Ala., Dec. 26, 2012) .....App. 437

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 1397139 (M.D. Ala., Apr. 5, 2013).....App. 408

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 1397139 (M.D. Ala., Apr. 5, 2013) (Thompson, J., concurring).....App. 427

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 3976626 (M.D. Ala., Aug. 2, 2013) (majority opinion) .....App. 278

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 4102154 (M.D. Ala., Aug. 2, 2013) (Thompson, J., concurring in part and dissenting in part).....App. 340

Alabama Legislative Black Caucus v. Alabama, ___ F. Supp.3d ___, 2013 WL 6726625 (M.D. Ala., Dec. 20, 2013) (majority opinion).....App. 1

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Alabama Legislative Black Caucus v. Alabama, Case Nos. 2:12-CV-691 and 2:12-CV-1081 (M.D. Ala., Dec. 20, 2013) (final judgment).....App. 276

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Date Filed	No.	Docket Text
08/10/2012	1	COMPLAINT; THREE-JUDGE COURT REQUESTED against Beth Chapman, The State of Alabama (Filing fee $ 350.00 receipt number 4602023799.), filed by Albert F. Turner, Jr, Rhondel Rhone, Alabama Association of Black County Officials, George Bowman, Alabama Legislative Black Caucus, Fred Armstead, Jiles Williams, Jr, Bobby Singleton. (Attachments)
08/27/2012	7	First MOTION for Partial Summary Judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus et al. (Attachments)
8/27/2012	8	BRIEF/MEMORANDUM in Support of 7 Motion for Partial Summary Judgment filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr., Jiles Williams, Jr.
08/31/2012	14	MOTION to Dismiss or, in the Alternative, Motion to Stay by Beth Chapman, The State of Alabama

09/13/2012	24	DESIGNATION OF THREE-JUDGE COURT [42 U.S.C. 1973c and 28 U.S.C. 22284]
09/19/2012	25	ORDER: Before the three-judge court is a 14 Motion to Dismiss or, in the Alternative, to Stay, filed by Defendant State of Alabama and Beth Chapman in her official capacity. Upon careful consideration of the motion, response, reply, and surreply (Docs.14, 15, 20, 23), as well as the supporting and opposing authority, it is ORDERED that the motion to stay is GRANTED until further order of the three-judge court. Plaintiffs and Defendants are DIRECTED to file a joint report on or before 10/31/2012, concerning the status of the declaratory judgment action in Alabama v. Holder, No.1:12-CV-1232 (D .D C .July 26, 2012), and the preclearance submission pending before the Attorney General of the United States.
10/10/2012	27	ORDER re 26 Joint Status Report. The parties have informed the court that the Attorney General of Alabama has been notified that the Attorney General of the United States does not interpose any objection to the House and Senate redistricting plans in Alabama Acts Nos. 2012-602 and 2012-603. The parties also have informed the court that the State of Alabama has filed a notice of

		voluntary dismissal in Alabama v. Holder, No. 1:12-CV-1232 (D.DC. July 26, 2012). Based upon the joint status report and the agreement of the parties, it is ORDERED that the stay imposed on 9/19/20 12 (Doc.25) is LIFTED and that Defendants shall file an Answer to the Complaint and a Response to Plaintiffs' 7 Motion for Partial Summary Judgment and for Preliminary Injunction on or before 10/26/2012. Plaintiffs may file a reply to Defendants' response on or before 11/2/2012. It is further ORDERED that Defendants' 14 MOTION to Dismiss, filed pursuant to Rule 12(b)(1) of the FRCP, is DENIED as moot
10/26/2012	28	ANSWER to 1 Complaint,, by Beth Chapman, The State of Alabama
10/26/2012	29	MOTION for Judgment on the Pleadings by Beth Chapman, The State of Alabama
10/26/2012	30	CONSOLIDATED MEMORANDUM in Support of 29 Motion for Judgment on the Pleadings and in OPPOSITION to Plaintiff's 7 Motion for Partial Summary Judgment, and 8 Brief in Support, and for Preliminary Injunction[RESPONSE to Dockets #7 & 8 – SUPPORTING #29] filed by Beth Chapman, The State of Alabama. (Attachments)

11/02/2012	32	REPLY BRIEF Supporting 7 MOTION for Partial Summary Judgment and MOTION for Preliminary Injunction and MOTION for Permanent Injunction, filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.
11/14/2012	35	RESPONSE in Opposition re 29 MOTION for Judgment on the Pleadings filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr. (Attachments)
11/26/2012	39	REPLY to Plaintiffs' 35 Response to 29 Motion for Judgment on the Pleadings filed by Beth Chapman, The State of Alabama.
12/13/2012	1	COMPLAINT; THREE-JUDGE COURT REQUESTED against State of Alabama, Robert J. Bentley, in his official capacity as the Governor of the State of Alabama, and Beth Chapman, in her official capacity as the Alabama Secretary of State (Filing fee $ 350.00 receipt number 4602025244), filed by Demetrius Newton, Alabama Democratic Conference, Framon Weaver, Sr., Stacey

		Stallworth, Rosa Toussaint and Lynn Pettway (Attachments)
12/18/2012	12	ORDER regarding DESIGNATION OF THREE-JUDGE COURT [42 U.S.C. 1973c and 28 U.S.C. 22284]
12/19/2012	42	ORDER directing that, pursuant to Rule 42(a)(2) of the FRCP, the three judge court finds that these actions involve common questions of law and fact and that consolidation would eliminate unnecessary repetition and confusion; accordingly, it is ORDERED that civil actions 2:12-CV-691 and 2:12-CV-1081 are CONSOLIDATED before the three-judge court; further ORDERED that the lead case shall be 2:12-CV-691 and that all pleadings, motions, briefs, orders, and other documents shall be filed only in 2:12-CV-691
12/26/2012	53	MEMORANDUM OPINION AND ORDER directing that the 7 motion by the Black Caucus for partial summary judgment and for preliminary and permanent injunction as to count one of its complaint is DENIED; the 29 motion by the State defendants for judgment on the pleadings as to count one of the complaint filed by the Black Caucus is GRANTED; the 29 motion by the State defendants for judgment on the pleadings as to count two of that complaint is DENIED; count three of

		that complaint is DISMISSED WITHOUT PREJUDICE; We GRANT the Black Caucus leave to amend its complaint within 21 days from the date of this order; the 29 motion by the State defendants for judgment on the pleadings as to count three of that complaint is DENIED AS MOOT; as further set out.
01/09/2013	59	ANSWER to Complaint [ANSWER TO COMPLAINT OF NEWTON PLAINTIFFS] by Robert J. Bentley, Beth Chapman, The State of Alabama
01/15/2013	60	AMENDED COMPLAINT against All Defendants, filed by Albert F. Turner, Jr, Rhondel Rhone, Alabama Association of Black County Officials, George Bowman, Alabama Legislative Black Caucus, Fred Armstead, Jiles Williams, Jr, Bobby Singleton. (Attachments)
01/25/2013	61	ANSWER to 60 Amended Complaint, by Beth Chapman, The State of Alabama
01/25/2013	62	MOTION to Certify Class ["Motion for Class Certification Scheduling Conference" by Beth Chapman, The State of Alabama
01/29/2013	63	ORDER LIFTING STAY AND DIRECTING PARTIES TO HOLE [sic] A RULE 26(f) CONFERENCE
02/06/2013	66	Second MOTION for Partial Summary Judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead,

		George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr. (Attachments)
02/06/2013	67	BRIEF/MEMORANDUM in Support re 66 Second MOTION for Partial Summary Judgment filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.
02/28/2013	76	RESPONSE in Opposition re 66 Second MOTION for Partial Summary Judgment filed by Beth Chapman, The State of Alabama. (Attachments)
03/04/2013	77	REPLY BRIEF re 66 Second MOTION for Partial Summary Judgment filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.
03/13/2013	82	MOTION to Intervene by Gerald Dial, Jim McClendon.(Attachments)
03/25/2013	88	BRIEF/MEMORANDUM in Support supplemental authorities filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr. (Attachments)

03/27/2013	90	ORDER granting 82 Motion to Intervene; Senator Dial and Representative McClendon are permitted to intervene as defendants
03/27/2013	91	Intervenors' ANSWER to 60 Amended Complaint, by Gerald Dial, Jim McClendon
03/27/2013	20	Intervenors' ANSWER to 1 [Newton] Complaint, by Gerald Dial, Jim McClendon
03/27/2013	93	MOTION to Alter or Amend 89 Order Denying Plaintiffs' 66 Second Motion for Partial Summary Judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus et al.
03/28/2013	94	ORDER GRANTING MOTION FOR CLASS CERTIFICATION: ORDERED that the ALBC Plfs' 69 Motion for Certification of a Class Action is GRANTED and the following subclasses are CERTIFIED pursuant to Rule 23(a) and (b)(2), as further set out in order; further ORDERED that attorneys James Uriah Blacksher, Esq., U.W. Clemon, Esq., and Wilson Edward Still, Esq., are DESIGNATED as class counsel; further ORDERED that the named Plfs in the ALBC action the Alabama Legislative Black Caucus, Bobby Singleton, Alabama Association of Black County Officials, Fred

Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr. are DESIGNATED as representatives of the Rule 23(b)(2) subclasses; further ORDERED that the Newton Plfs may appear, participate, and present claims individually in this consolidated litigation, as further set out in order

04/03/2013 95 MOTION for Partial Summary Judgment [MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO THE ALBC PLAINTIFFS RESTATED PARTISAN GERRYMANDERING CLAIM] by Beth Chapman, The State of Alabama

04/03/2013 96 BRIEF/MEMORANDUM in Support re 95 MOTION for Partial Summary Judgment [MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO THE ALBC PLAINTIFFS RESTATED PARTISAN GERRYMANDERING CLAIM] filed by Beth Chapman, The State of Alabama. (Attachments)

04/04/2013 97 MOTION to Amend/Correct 96 BRIEF/MEMORANDUM in Support, by Beth Chapman, The State of Alabama.

04/04/2013 98 AMENDED Memorandum in Support of 95 Motion for Partial Summary Judgment, filed by Beth Chapman, The State of Alabama. Amending 96 Memorandum in Support. (Attachments)

04/05/2013 101 MEMORANDUM OPINION AND ORDER: We DENY the 93 Motion to alter or amend our judgment. We sua sponte VACATE our initial 89 order denying the 66 second motion for partial summary judgment and SUBSTITUTE this memorandum opinion and order. We DENY the 66 second motion for a partial summary judgment for the reasons stated in the opinion and order

04/05/2013 102 THOMPSON, District Judge, concurring with 101 Memorandum Opinion and Order

04/17/2013 106 RESPONSE in Opposition re 95 MOTION for Partial Summary Judgment [MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO THE ALBC PLAINTIFFS RESTATED PARTISAN GERRYMANDERING CLAIM] and brief supporting ALBC plaintiffs' motion to reconsider denial of their second motion for partial summary judgment and motion for entry of a permanent injunction filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.

04/17/2013 107 MOTION for Reconsideration of denial of plaintiffs' second motion for

		partial summary judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus et al.
04/17/2013	108	MOTION for Permanent Injunction by Alabama Association of Black County Officials, Alabama Legislative Black Caucus et al.
04/24/2013	109	REPLY to ALBC Plaintiffs' 106 Response to ALBC State Defendants' 95 Motion for Partial Summary Judgment and Response in Opposition to ALBC Plaintiffs' 107 MOTION for Reconsideration and 108 MOTION for Permanent Injunction filed by Beth Chapman, The State of Alabama.
05/06/2013	111	REPLY to Defendants' 109 Response to Plaintiffs' 107 MOTION for Reconsideration of denial of plaintiffs' second motion for partial summary judgment, and 108 MOTION for Permanent Injunction filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.
06/17 2013	121	MOTION for Summary Judgment with Respect to Remaining Claim of the ALBC Plaintiffs of Race-Based Vote Dilution and Isolation by Beth Chapman, The State of Alabama

06/17/2013 123 MOTION for Summary Judgment with Respect to Newton Plaintiffs' Claims by Beth Chapman, The State of Alabama

06/17/2013 124 BRIEF/MEMORANDUM in Support re 123 MOTION for Summary Judgment filed by Robert J. Bentley, Beth Chapman, The State of Alabama. (Attachments)

06/17/2013 125 BRIEF/MEMORANDUM in Support re 121 MOTION for Summary Judgment filed by Beth Chapman, The State of Alabama. (Attachments)

06/28/2013 130 ORDER: We ORDER the parties to file simultaneous supplemental letter briefs by Tuesday, July 9, 2013, to address whether this claim under the Equal Protection Clause is ripe for review and whether the Black Caucus plaintiffs have standing to bring it. We invite both parties to submit any material evidence along with their letter briefs to help us resolve these questions.

07/01/2013 131 THOMPSON, District Judge, concurring, as further set out.

07/09/2013 132 REPLY BRIEF (Joint) filed by Beth Chapman, Gerald Dial, Jim McClendon, The State of Alabama pursuant to this Court's 130 Order and the concurring opinion of Judge Thompson of 7/1/2013 (No. 131). (Attachments)

07/09/2013 133 SUPPLEMENTAL BRIEF responding to 130 Order, 131 Order requesting supplemental briefs on ripeness and standing filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr., Jiles Williams, Jr.

07/10/2013 134 RESPONSE in Opposition re 121 MOTION for Summary Judgment re racial discrimination claims filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr. (Attachments)

07/10/2013 135 RESPONSE to Motion for Summary Judgment by Demetrius Newton, et al.

07/10/2013 136 BRIEF in support of RESPONSE to Motion for Summary Judgment by Demetrius Newton, et al.

07/10/2013 137 Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support filed by Alabama Democratic Conference, Demetrius Newton, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)

07/10/2013 138 Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support filed by Alabama Democratic Conference, Demetrius Newton, Lynn

		Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)
07/10/2013	139	Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support filed by Alabama Democratic Conference, Demetrius Newton, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)
07/10/2013	140	Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support filed by Alabama Democratic Conference, Demetrius Newton, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)
07/10/2013	141	Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support filed by Alabama Democratic Conference, Demetrius Newton, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)
07/10/2013	142	Evidentiary Submission re 136 BRIEF/MEMORANDUM in Support Corrected Exhibit EE filed by Alabama Democratic Conference, Demetrius Newton, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr. (Attachments)
07/16/2013	153	ORDER ON PRETRIAL HEARING

07/17/2013 154 REPLY BRIEF (Consolidated) to the 134 Response to the 121 Motion for Summary Judgement, filed by Beth Chapman, Gerald Dial, Jim McClendon, and The State of Alabama. (Attachments)

07/17/2013 155 REPLY BRIEF (Consolidated) re 135 Response to 123 Motion for Summary Judgement, filed by Robert J. Bentley, Beth Chapman, Gerald Dial, Jim McClendon, The State of Alabama. (Attachments)

07/22/2013 161 SECOND SUBMISSION of Supplemental Authorities in Support of Second Motion for Partial Summary Judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr., Jiles Williams, Jr.

07/30/2013 165 ORDER ON PENDING MOTIONS re 95 Motion for Partial Summary Judgment; 107 Motion for Reconsideration; 108 Motion for Permanent Injunction; 121 Motion for Summary Judgment; and 123 Motion for Summary Judgment. For the reasons the court will explain in an opinion to follow, it is ORDERED that the ALBC Defendants motion for a partial summary judgment against the claim of partisan gerrymandering in count three of the ALBC Plaintiffs

amended complaint is GRANTED. The facial challenge under the Equal Protection Clause in count three of the ALBC Plaintiffs amended complaint is DISMISSED for lack of subject matter jurisdiction. The motion by the ALBC Plaintiffs for reconsideration of the courts order denying their motion for a partial summary judgment as to count three of their amended complaint is DENIED. The motion by the ALBC Plaintiffs for entry of a permanent injunction is DENIED as moot. Judge Thompson will file a separate opinion concurring in part and dissenting in part. It is further ORDERED that the ALBC and Newton Defendants motions for summary judgment are DENIED. After careful consideration of the briefs and evidence, the Defendants have failed to persuade the court that there are not genuine disputes as to material facts and that the Defendants are entitled to judgment as a matter of law

08/02/2013 174 MEMORANDUM OPINION AND ORDER: On consideration of the motions, reply, and response (Docs. 95, 106, 107, 108, 109) as well as supporting and opposing authority, it is ORDERED that the motion by the State defendants for a partial summary judgment as to the claim of partisan gerrymandering in count

three of the amended complaint filed by the Black Caucus plaintiffs is GRANTED. We DISMISS the facial challenge under the Equal Protection Clause in count three of the amended complaint filed by the Black Caucus plaintiffs for lack of subject matter jurisdiction. The motion by the Black Caucus plaintiffs for reconsideration of our order denying their motion for a partial summary judgment as to count three of their amended complaint is DENIED. The motion by the Black Caucus plaintiffs for entry of a permanent injunction is DENIED AS MOOT.

08/02/2013	175	THOMPSON, District Judge, concurring in part and dissenting in part with 174 MEMORANDUM OPINION AND ORDER.
08/06/2013	182	Corrected Joint Stipulations of Facts
08/12/2013	187	NOTICE OF APPEAL filed by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr., Jiles Williams, Jr. as to 165 Order entered 7/30/2013, and the 174 Memorandum Opinion and Order denying plaintiffs' motion for a permanent injunction entered on 8/2/2013.
08/13/2013	188	Amendment to Joint Stipulations of Facts

08/21/2013	194	ALBC Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law
08/21/2013	195	NEWTON PLAINTIFFS' Notice of Filing and Proposed Findings of Fact and Conclusions of Law
08/21/2013	196	Proposed Findings of Fact and Conclusions of Law by Jim Bennett, Gerald Dial, Jim McClendon, The State of Alabama
12/20/2013	203	MEMORANDUM OPINION AND ORDER as further set out in the opinion and order.
12/20/2013	204	THOMPSON, District Judge, dissenting re 203 Memorandum Opinion and Order.
12/20/2013	205	FINAL JUDGMENT: In accordance with the prior proceedings, opinions, and orders of the court, it is the ORDER, JUDGMENT, and DECREE of the three-judge court that in (1) civil action 2:12-cv-691 judgment is entered in favor of Defendants the State of Alabama, the Secretary of State of Alabama, Gerald Dial, and Jim McClendon and against Plaintiffs Alabama Legislative Black Caucus [et al.] and (2) in civil action 2:12-cv-1081, judgment is entered in favor of Defendants the State of Alabama, the Secretary of State of Alabama, the Governor of Alabama, Gerald Dial, and Jim McClendon and

against Plaintiffs the Alabama Democratic Conference [et al.]. Costs are taxed against Plaintiffs in civil action 2:12-cv-691 and in civil action 2:12-cv-1081. The Clerk of the Court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil [sic].

01/06/2014 207 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES as to 205 Judgment by Alabama Association of Black County Officials, Alabama Legislative Black Caucus, Fred Armstead, George Bowman, Rhondel Rhone, Bobby Singleton, Albert F. Turner, Jr, Jiles Williams, Jr.

01/14/2014 210 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES as to 205 Judgment, 203 Memorandum Opinion and Order, by Alabama Democratic Conference, Lynn Pettway, Stacey Stallworth, Rosa Toussaint, Framon Weaver, Sr.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS; et al.,

Plaintiffs,

vs. CASE NO.: 2:12-cv-691-WKW-MHT-WHP

THE STATE OF ALABAMA, et al.,

Defendants.

DEMETRIUS NEWTON, et al.,

Plaintiffs,

vs CASE NO.: 2:12-CV-1081-WKW-MHT-WHP

THE STATE OF ALABAMA, et al.,

Defendants.

* * * * * * * * * * * * * * * *

NON-JURY TRIAL – VOLUME I

* * * * * * * * * * * * * * * *

* * *

[1-24] GERALD DIAL

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. WALKER:

* * *

[1-26] Q. So one of your goals was to make redistricting this time more transparent than in the past.

A. Yes. In the past, even though I had been a majority member of the party who redistricted, I was never included and never consulted with, and I wound up with what I got was what I had. So I thought I would be in a position to include more legislators.

* * *

[1-27] Q. Let's look at those guidelines for a second. This is Exhibit C-1, which I'll – and I want to ask you. It says right up here on the first page, it talks about one person, one vote. [1-28] Was that an important consideration?

A. It certainly was. And we were concerned with that so that we could get a plan that would meet the Justice Department guidelines and so we – that's why we changed one portion of the guidelines, and we went to plus or minus 1 percent rather than 5.

Q. Were you also concerned that one person, one vote was necessary to avoid lawsuits after the plan was precleared?

A. Yes.

Q. And was it also an important goal to comply with the Voting Rights Act?

A. Absolutely. Yes, sir.

Q. And did that affect how you proceeded as you drew the plan?

A. Yes. That was one of my major goals in asking to be chairman. I wanted to see if we could not pass a plan that would meet the voting rights requirement, and that was one of our ultimate goals.

Q. I see down here at paragraph two where I have my finger that it talks about the necessity of avoiding retrogression. And how did you understand that as you drew the plan?

A. That we could not in any plan reduce the number of black votes in any district that had been determined to be a majority black district.

Q. Well, first, you wanted to create as many African American majority districts as possible; is that correct?

A. That's correct, but we also understood there were already [1-29] established numbers that had been established under the last redistricting plan, and we were committed not to regress those.

Q. Either in terms of number or in population.

A. Correct.

Q. And you understood that the population levels of the last plan had been precleared; is that correct?

A. That's correct.

Q. And had not suffered any Section 2 attack?

A. Correct.

Q. Was it also important – and I'm looking at the same exhibit on page 3 of 8 – to avoid contest between incumbents?

A. Yes. The commitment that we had made is not to put any two incumbents in the same district within the Senate plan.

Q. And also, to the extent possible, to protect communities of interest?

A. Yes, as much as possible.

* * *

[1-36] Q. And where did you start to draw the plan?

A. Started to draw the plan with the black districts, the minority districts in this case, because of meeting the requirements of the Voting Rights Act, realizing that our commitment was not to regress any of those districts. Each of those districts had to expand. Every minority district in this state had lost population and had to grow.

Q. And in addition to losing population, had those minority districts been systematically under-populated in the 2001 plan?

A. Yes. And when we changed to plus or minus 1, it drastically required each one of them to gain a significant number of population. And I realized in that gaining of population, to keep from regressing the district and increasing that population, we had to increase it percentagewise on the same number of minority votes that we had. And so that created a problem, realizing the whole plan is like a domino. If you change one district, you effectively change the whole state. So I began by drawing the minority districts and worked from there out. And basically what we had left was basically filling in the blanks with what was left after we did the minority districts.

Q. So in other words, you began by finding enough people to [1-37] bring the minority districts back up to population within the plus or minus 1 standard?

A. That's correct.

Q. And that included bringing the African American populations of those districts up to approximately equal as best you could with what it had been in 2001?

A. Yes. And we were able to accomplish that almost 100 percent.

* * *

Q. Okay. And did Senator Hank Sanders attend that hearing?

A. Yes.

Q. Did he at that time give you any instructions about his district or about African American districts in general?

A. He did both. I had talked to Senator Sanders. He realized his district had to grow. And I had made a commitment to him and others that we would not put any two incumbents together. So he gave me some instructions on how he thought his district should grow. He also told me, and it's public record, that he felt like that the minority districts should be at a minimum 62 percent minorities.

* * *

[1-38] A. Well, basically, he said that I'll have to grow, and I would have to grow basically into Senator Keahey's district. He needed part of, basically, Choctaw and Marengo. He wanted to keep Lowndes, as I remember, in one county district.

And one of the things we were trying to do, he had a small sliver of Lowndes that allowed him to get into Autauga County, and he – basically, we wanted to get him out of Autauga [1-39] County. He wanted out, so he wanted to put Lowndes all into one county. I think he gave me about four or five suggestions. I was able to accomplish two or three of those.

Q. And did he also make a suggestion to you about what should happen to the African American members of Senator Keahey's district?

A. Well, basically, they would have to go into his district in order for his district to pick up the numbers he needed and to increase the population he had to have. He needed minorities to do that if we were going to keep the – not regress his district.

JUDGE THOMPSON: That's District 22?

MR. WALKER: That's –

THE WITNESS: Yes. That's correct.

MR. WALKER: District 22, yes, sir. Senator Keahey's district.

Q. Did you meet with other democratic senators; for example, the democratic senators from Birmingham?

A. Yes. I met with all the senators, and I met with Senator Smitherman, Senator Coleman, and Senator Dunn.

* * *

[1-40] Q. This is the actual exhibit. This is what Senator Smitherman actually brought to Senator Dial; is that correct?

A. That's correct, yes.

Q. And was he representing the Jefferson County Democratic senatorial delegation?

A. Yes. I had met and gone over with Senator Smitherman and Senator Dunn and Senator Coleman that their districts had to grow, but – again, populationwise. And this Jefferson County thing is very complex, so I asked them to – Senator Smitherman informed me that he had worked on a plan; that he had a plan that would meet the guidelines. I asked him to bring me that plan. He brought me this plan. He brought me the plan, and we [1-41] encompassed this plan into the Senate Dial 2. It's probably 99.9 percent what they brought us and what both – all three of those people agreed on.

* * *

[1-42] Q. Well, now, that's an interesting point. You couldn't please every senator, could you?

[1-43] A. I'm not sure I pleased any of them. I didn't please myself, so I'm not sure how many – but that's very difficult to do.

Q. But Republican and Democrat, people left your office from time to time unhappy.

A. Very unhappy. And our job was to get a plan, as I began to, that would meet Justice and do the best we can to reapportion one person, one vote.

Q. So throughout the drawing of this plan, you were balancing on one hand the requirements of meeting the law, the constitution, one person, one vote, the requirements of the Voting Rights Act and the guidelines, versus the individual wishes of Republican and Democratic senators. And you had to count votes in that process, didn't you?

A. Got to have enough to pass it, and I can't create an opportunity where I at least can't have enough votes for cloture.

* * *

[1-45] Q. Tell the Court about your efforts to work with Senator Keahey. As we've said, Senator Keahey is District 22, and he's a white Democrat; is that correct?

A. That's correct.

Q. And what was the issue with Senator Keahey?

A. Well, the problem with Senator Keahey's district is it goes back to Senator Sanders' district having to grow and having to grow in minorities. And when I moved Senator Sanders into – to pick up the minorities he needed, it pushed Senator Keahey south. Baldwin County had created some growth in that area, and there was too many people in Baldwin County, so it forced Senator Keahey down into the northern part of Baldwin County. So it changed his district pretty drastically.

* * *

[1-54] CROSS-EXAMINATION

BY MR. BLACKSHER:

* * *

[1-55] Q. Race was the factor that drove most of this entire Senate plan?

A. Trying to meet the voting rights requirements was the basis on which I drew the plan.

Q. And to be clear, the retrogression standard that you applied required not only that you maintain the 27 majority black House districts and the eight majority black Senate districts, but that you maintain the black majority percentage, the level, the size of the black majorities in those districts; is that correct?

A. Yes, sir. I concentrated my effort on the Senate districts and had very little input into the House plan.

* * *

[1-56] Q. In fact, you considered that as high – that the higher the size of the black majority, the better as far as the Voting Rights Act was concerned; is that right? You testified, didn't you, that you did not consider any black percentage too high?

A. On the plan that we adopted, that's correct.

* * *

Q. And you thought that the plus or minus 1 percent restriction of overall population deviation in every district was something that would help you get Section 5 preclearance in the Justice Department.

A. Correct.

Q. In fact, as you said in your affidavit, the first one you filed in this court, your objective was to construct guaranteed black safe districts, right?

A. Correct.

Q. You thought that would be a safe harbor under Section 5 of the Voting Rights Act?

A. I thought that would be the primary way that we could get this plan approved by Justice.

[1-57] Q. In fact, you said that when you were drawing this plan, you didn't consider partisan data at all. You were only focused on the racial data. Isn't that right?

A. What I was focusing on was not regressing the minority districts so we could get a plan approved by Justice Department.

Q. Okay.

* * *

[1-63] Q. So what you're saying, Senator, is that in pursuing your overriding goal of maintaining the large black majorities in the majority black districts, if that resulted in blacks being taken out of the majority white districts, diluting their influence in those majority white districts, that was just collateral damage? That was just an accident or the results you get because of pursuing the Voting Rights Act?

A. That was because of the Voting Rights Act.

Q. So we can blame the Voting Rights Act for the loss of black influence in the majority white districts?

A. Absolutely.

Q. Specifically, we can blame Section 5 of the Voting Rights Act, the preclearance requirement.

A. Preclearance.

Q. Yes.

A. Preclearance is what – that was our ultimate goal.

* * *

[1-67] Q. What instructions did you give Randy Hinaman?

A. What instructions? I gave him the – I told him to draw in the Smitherman Coleman Dunn plan. I told him that I would – I didn't want any two incumbents in the same district. And I wanted to, as we looked at the plan, how did we make and fill in the number of minorities to insure that we did not regress the [1-68] minority districts.

* * *

[1-69] Q. Okay. The instructions you gave Randy Hinaman were twofold. Isn't that correct? One, do not retrogress the majority black districts as per your standards.

A. Correct.

Q. And two, don't put two incumbent senators in the same district.

A. Correct.

* * *

[1-70] Q. * * *

So you testified that the necessity of making sure that the black majority percentages stayed as high as they appeared on the retrogression chart, that caused the districts, for example, Senate District 1 that goes all the way into Madison County, it affected Roger Bedford's district, which is Senate District 7.

[1-71] A. Correct.

* * *

[1-73] Q. Your first priority was population equality, right?

[1-74] A. Yes.

Q. Your second priority is Sections 2 and 5 of the Voting Rights Act, right?

A. Yes.

Q. Your third priority is, again, no district will be drawn in a manner that subordinates race-neutral districting criteria to considerations that stereotype voters on the basis of race, color, or membership in a language minority group.

That was your third priority, right?

A. Yes.

Q. Your fourth priority is contiguity and compactness. Right?

A. Correct.

Q. And the fifth priority was to follow the requirements prescribed by the Alabama Constitution.

A. Correct.

Q. And the sixth priority: The following redistricting policies contained in the Alabama Constitution shall be observed to the extent they do not violate or conflict with the requirements prescribed by the Constitution and laws of the United States.

And the first requirement under that is, each House and Senate district should be composed of as few counties as practicable.

And then your seventh requirement was traditions, customs, and usages, including contests between incumbents.

[1-75] So preserving county boundaries in your guidelines had a higher priority than protecting incumbents, didn't it?

A. And we said where practicable. And where it was practicable to do that, we did it.

* * *

Q. Okay. And what made it impractical to give county boundaries a lower priority than incumbent protection?

A. The Voting Rights Act and not regressing the minority districts.

* * *

[1-77] A. I'm sure – I recognize Senator Sanders, the bill he introduced, yeah. I'm not – I can't verify that that's it from my – my point of view, but he introduced a plan.

Q. That keeps Mobile County whole and takes care of the extra population in Baldwin County, doesn't it?

A. Yes, but it totally regressed the minority districts.

Q. And, in fact, your testimony in your deposition was that the only reason that you rejected the SB 5 plan was because it did not maintain the high black majority percentages, right?

A. Right.

Q. It had eight majority – voting age black majority districts, but it did not have the same high percentages. Right?

A. Right.

* * *

[1-78] CROSS-EXAMINATION

BY MR. TANNER:

* * *

[1-81] Q. The Justice Department guidelines that you reviewed do mention, however, the obligation to avoid fragmenting minority concentrations. Is that not correct?

A. * * * My goal was, based on what had happened in prior reapportionments, to not regress the minority districts in this state. All of them had to grow by population. And if they grew in population, they had to grow in the same percentage that they already have and not regress that district. * * * So that's my understanding of what we needed to do as far as meeting the guidelines of the Justice Department on not regressing minority districts.

* * *

[1-96] Q. * * *

Well, before we get into that. You've testified about how you were unwilling to lower the minority percentage in any district to avoid your view of what regressing was – retrogressing.

A. That's correct.

* * *

[1-124] A. But as I said earlier, if I had not had to contend with the Voting Rights Act, you could have seen quite a different map than you see today. But remember, that was the first priority, to make sure that we did not regress the minority districts. And as the minority districts grew, we would not regress the number of minorities in those districts. That was the plan which I began to work from, and I worked from that out.

* * *

[1-131] Q. Now, if you do the math, which I should have done on the chart, in redrawing these districts, you added 14,826 people to District 26; and of those 14,826 people, only 36 were white. And if you had not added a single black person to that district, if you had added those 14,826 people, if you could do it so every single one of them was white, the district still would have been over 64 percent black. And that would be plenty for Senator Ross to win reelection, wouldn't it?

A. That would have regressed the district, would it not?

Q. Would it have been – the answer is no. But it would have [1-132] been plenty for him to get reelected, wouldn't it? Do you have any doubt that Senator Ross would be able to get reelected in a district that's 64 percent black?

* * *

[1-135] Q. And you rejected – you testified you rejected Senator Sanders' plan because you understood that you couldn't lower the black percentage in any district.

A. That's correct.

* * *

[1-136] Q. So your testimony is that you really didn't look into the behavior of individual districts. Instead, you simply went by the black – the number of black people, the black percentage in the district,

and what you did was try and at least maintain that or increase it. Is that your – fair statement of your testimony?

A. That's fair, yes.

* * *

[1-137] A. My contention was that if we regressed the number of minority districts in population or in number, that we would not meet the guidelines of the Voting Rights Act, and ultimately the Court would probably draw the district lines in the state of Alabama like they're doing in other states.

Q. Why did you believe that the Justice Department would go contrary to the considered judgment of every black member of the Alabama Legislature? On what do you think they would base that [1-138] decision?

A. Based on what they had done in other states, in Florida and Texas and other states, and throwing out their plans and the courts stepping up and drawing plans for whatever reason. And our ultimate goal was to draw a plan that would be approved by the Justice Department, which I did. The Legislature approved and the Justice Department has approved this plan that we drew.

Q. On whose – who told you about this besides Senator Walker? Whose advice did you take as to finding this, what sounds like a bright-line standard, that whatever you got, you can't go under it from the

Justice Department? If it's a 99 percent black district, you can't go to 97? On whom – where did you get this?

A. Simply from my experience and in talking with our attorney, that we could not regress or we should not regress. If we wanted to pass a plan that would meet Justice Department, we could not regress the minority districts in number of districts and in the number of population within those districts.

Q. And it's your testimony that Mr. Walker told you that?

A. In our discussion, yes.

* * *

[1-139] REDIRECT EXAMINATION

BY MR. WALKER:

* * *

[1-146] Q. Are you claiming, sir, that Dial 2 is perfect?

A. No, sir.

Q. Are you claiming it's the only possible way to draw districts?

A. Oh, no, sir.

Q. Are you confident that the plan is fair in the way it draws districts of near equal size?

A. Yes.

Q. Are you confident that you did not have any intent to discriminate against anybody on the basis of race when you drew that plan?

A. Yes.

Q. Does it put all 35 senators elected in 2010 in separate districts instead of putting incumbents together?

A. Yes.

Q. Did it keep the same number of minority districts that you had before?

A. Yes.

Q. And it kept those districts about the same minority [1-147] proportions as they were before, right?

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS; et al.,

Plaintiffs,

vs.

THE STATE OF ALABAMA, et al.,

Defendants.

CASE NO.: 2:12-cv-691-WKW-MHT-WHP

DEMETRIUS NEWTON, et al.,

Plaintiffs,

vs

THE STATE OF ALABAMA, et al.,

Defendants.

CASE NO.: 2:12-CV-1081-WKW-MHT-WHP

* * * * * * * * * * * * * * * * *

NON-JURY TRIAL – VOLUME II

* * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE WILLIAM H. PRYOR, United States Circuit Judge, presiding, THE HONORABLE MYRON H. THOMPSON, United States District Judge, and THE HONORABLE W. KEITH WATKINS, United States District Judge, * * *

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* * *

[2-6] RODGER SMITHERMAN

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

* * *

[2-36] CROSS-EXAMINATION

BY MR. WALKER:

* * *

[2-40] Q. Are you claiming that Senator Dial is a racist?

A. No. I'm not saying Senator Dial is racist at all. I knew Senator Dial before I even became a senator. Tell you the truth, he – I worked with him on drafting of the sports agent bill, and I was – I wasn't even a senator then. So I've known Senator Dial for a long time. No, not at all. I'm saying that the plan is racist. I'm not saying that Senator Dial is by no means.

Q. Well, are you saying that he drafted it for a racist purpose?

A. No. I think he drafted it so that the county would be controlled by the people in his party. And to do that, he had to disenfranchise the people in the county because the majority of the people who was placed in the plan, majority of their districts are outside of the county.

* * *

[2-66] WILLIAM S. COOPER

The witness, having previously been duly sworn to speak [2-67] the truth, the whole truth and nothing but the truth, further testified as follows

* * *

[2-109] CROSS-EXAMINATION

BY MR. PARK:

* * *

[2-122] Q. You talked about county splitting. Let me represent to you that in the 2012 House plan, Blount County is split into four House districts. Do you know whether Blount County is majority white or majority black?

A. I believe it's majority white.

Q. In fact, Blount County, according to the census, is 1.3 percent black. Do you think that the county splitting is because of race?

A. No. I think the county splitting in north Alabama, generally speaking, except with the exception perhaps of a Senate district that goes across Lauderdale and Limestone into Madison County, is maybe more politically motivated. I don't [2-123] know. I mean there's Blount County, and then I think it's Dekalb County that's split six ways. That's a majority white county with a significant Hispanic population, but I can't really imagine that the objective there was to split the vote of Latinos. So I don't know what all the motivations were in north Alabama.

Q. Let me tell you that all four of the representatives who have a piece of Blount County in the new plan are Republicans. Does that tell you it's not partisan, too?

A. I don't know. There could have been some sort of interparty squabble, or it could just be random. I don't know exactly what was in the map maker's mind, Mr. Hinaman, when he was doing this map. So you'll – you know, I'll just have to draw a blank on that. I don't know the motivation.

Q. So you just draw a blank rather than speculating?

A. Well, it's not appropriate to speculate, I guess.

Q. Let's look at Marshall County. Marshall County is split five ways. Again, Marshall County is 1.6 percent black. Is that because of race?

A. Apparently not.

Q. And, again, it's all Republicans. Do you think that's because of political party considerations?

A. It could be, but it's still not good redistricting practice.

* * *

[2-124] QUINTON ROSS

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

[2-125] DIRECT EXAMINATION

BY MR. TANNER.

* * *

[2-129] Q. And what is – what's the racial composition of that district?

A. According to the new plan, it's about 71 percent black.

Q. And is that higher or lower than it was under the old plan?

A. It's much higher.

Q. Now, your district was underpopulated. And I need to correct a misimpression that I left yesterday due to my failure to include charts. Your district was underpopulated by I believe 15,898 people?

A. Yes, sir.

Q. And if you added 16,000 white people, no black people, your district would have been more – little over 64 percent black. Would you have been comfortable in terms of the opportunities for the voters, black voters in your district in a district with a 64 percent black majority?

A. Yes, sir.

Q. How long would you be willing to go in terms of the black [2-130] percentage in your district and still feel comfortable?

A. Well, I like to believe I have good political standing, so 50, 55 percent. 50, 60 percent.

Q. And instead of 16,000 white people, they added 15,785 black people, including only 36 white people. How easy is it to find, outside your old district especially, an area with 15,785 people, of whom only 36 are white? Is that possible?

A. You have to make sure you look hard to find them.

Q. Now, would you like to have more white population in your district?

A. Sure.

Q. And if they did lower – you said you would feel comfortable with 55 or 60 percent. You've got 75 percent now.

A. Yes, sir.

* * *

[2-135] JUDGE THOMPSON: Let me ask you this, Senator Ross. Did your district lose any white areas?

[2-136] THE WITNESS: It lost, if I'm not mistaken, splits of the precinct. The precincts caused some whites to be shifted out.

BY MR. TANNER:

Q. Have you reviewed the precinct splits, Senator Ross, under the new plan?

A. Yes.

Q. And what do they have in common?

A. All of them basically, you know, shifted substantial number of blacks into my district but reducing the amount of whites that I had in there.

* * *

[2-152] REDIRECT EXAMINATION

BY MR. TANNER:

* * *

Q. Now, under the new plan, the district drawn by the Senate crosses the Southern Bypass, does it not?

A. Yes, sir.

Q. And it crosses it to take in black population?

A. Yes, sir.

Q. And it breaks up this natural dividing line –

A. Yes, sir.

Q. – to the effect of moving black population into your district?

A. Yes, sir.

* * *

[2-154] JOE L. REED

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

[2-155] BY MR. ANDERSON:

* * *

A. My name is Joe L. Reed. R-E-E-D. I live at 874 John Brown Avenue, Montgomery, Alabama 36106.

* * *

A. Yes. What's the Alabama Democratic conference?

Q. Yes, sir.

A. Alabama Democratic Conference is an organization, a [2-156] Democratic organization that was founded in 1960 for the purpose of advancing blacks politically in Alabama and to get influence in the political process. We participate in voter registration.

We participate in lobbying. We participate in begging. We participate in anything we can do to advance blacks in general and – Alabama in general and blacks in particular.

* * *

[2-157] Q. Why have you been involved and why has your organization been involved in these redistricting cases?

A. Well, in 1970 I ran for the Legislature from Perry, Marengo, and Sumter counties, and I didn't realize how the district lines were drawn. I ran and ran for that office all over the black belt, and I didn't realize those lines were drawn in such a way that I couldn't win. And so I lost that election. Maybe it was a blessing in disguise.

Then in 1975, Montgomery went from a commission form of government to a mayor council form of government. When the district lines were first drawn, there were two majority black districts and seven majority white districts. I thought that was unfair, and I set out to draw some lines myself, and that's when I first started drawing lines.

* * *

[2-158] But that's what really got me involved, when I realized that reapportionment plans can achieve whatever results the drafter wants them to achieve. There's no perfect reapportionment plan. A reapportionment plan depends on what the drafter wants to get, and he can draw them many, many,

many ways. So I started drawing them because that's the results I wanted when I drew a plan.

* * *

[2-159] Q. And at that time, did you have an opinion about what type of percentage of voters in a district would be needed in order – of people that were – that lived in a district, the population in the district, the percentage needed to be to assure an election of a black official?

A. For a long time, I labored under the theory that – and even in some instances maybe even applied today, but not as much as it did then – that you needed about 65 percent blacks to get a safe black seat. Once you counted the unregistered voters, once you counted the low turnout, once you counted those who were living but not even qualified to vote, all of those factors played into it. But I was talking about 65 percent. I'm talking about 65 percent for the population. But you put all the mix in, registered and unregistered, and those who are even unqualified – there are a lot of blacks who are just unqualified to vote in the sense that they have – may have prison records because of our criminal justice system. So all of that fed into my decision and my conclusion as to what it would take to have a safe black district. I have modified my position somewhat since that time.

[2-160] Q. And what is the reason that you – I've been going historically. You felt like 65 percent because of these other factors about who would actually vote?

A. Yes.

Q. But what's led you to modify your position from the 1970s?

A. We have registered more blacks. More blacks are registering. A few more whites have voted for blacks. A few more. All of those factors come into it. And we think that 60 percent – I mean 60 percent now is a safer – that's what – that's what I prefer.

Q. Your opinion today is around 60 percent?

A. Around 60 percent. Now, there may be – sometimes you can't get 60 percent. You have to take what you can get, take the hand that's dealt you, and go with it. Sometimes you don't have the people. So if you have 55 percent, okay. If you got 53 percent, okay. Take what you can get and go with it. But my overall goal would be a safe district now would be about 60 percent.

* * *

[2-164] Q. Going to drafting districts, which you've said you had some experience with. And you understand, from time to time the – the state constitution says that we're supposed to keep these legislative districts within county lines. You know with one man, one vote, that hasn't happened. You've drafted plans where you've crossed county lines.

A. Yes. We call those – and we started this, really, back in 1983, what we called, Jim, the county line plan, where I think Jim Blacksher was the first

one to call to my attention what the Alabama constitution said when we were drawing the plan. I drew that plan in 1983. And we called splits necessary splits and unnecessary splits. We split some counties then, but there was some unnecessary splits that we did not – some counties, we did not make with what we could possibly get around.

* * *

[2-165] Q. And some of those plans you split voting precincts also?

A. Yes. We split voting precincts because that's going to happen anyway.

* * *

[2-166] A. I went to the hearings. Sure I did. He said, you got three minutes. I said, take me three minutes to clear my throat. I said, I can't talk to you about a reapportionment plan in three minutes.

* * *

[2-168] Q. Yes, sir. And in this plan, for example, House District 73, which was the district I live in in Montgomery, represented by Joe Hubbard now, had been – in the plan that the Legislature passed was moved to Shelby County. You kept House District 73 in this plan, didn't you, in Montgomery?

A. Yes. We didn't try to change House District 73.

Again, you go back, a drafter can achieve a lot of things he wants to achieve. For example, if I had just

really set out to do it, I could have gotten another black district in Montgomery. I didn't do that. I told Joe Hubbard, I said, what we're going to do is this. We're going to – what we're going to do is this. We're going to keep all the districts, the Republicans and the Democrats, alike. I told Joe Hubbard, I said, we're going to reduce your numbers a little bit from 48 percent black down to maybe around 40 percent because, I said, you get too many, some black is going to run against you, and we [2-169] can't stop it. So I think we ought to have kind of a diverse Legislature, representatives in the Legislature. I do believe that. And Joe has been doing all right. And we got along with some others, too. So we didn't try to change Democrats or Republicans in the whole state. We left – that's why I called it the status quo.

* * *

[2-196] BERNARD SIMELTON

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. TANNER:

* * *

[2-205] Q. Let me move from the Latino population to another important population in Alabama. Does the NAACP and your local branches have any relationship with the Mowa Band of the Choctaw Nation down in south Alabama?

A. Right. We have worked with them on trying to get their federal recognition. As a matter of fact, in 2012 – let's see – I think it was 2011, we went to our national convention, and we were able to get a national resolution passed through our national organization in support of the federal recognition of the Mowa Choctaw Indians.

Q. And at the local level, to your knowledge, down in Washington County and Mobile County where the Mowa mainly live and in Escambia County where other native Americans live, is there a good, close, working relationship with the –

A. I can speak for the Baldwin County area and Washington County. Mobile County, I know they work real closely with the Vietnamese community there, but I know Baldwin County and Washington County work with the Mowa Indians.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE
BLACK CAUCUS; et al.,

Plaintiffs,

vs. CASE NO.: 2:12-cv-691-WKW-MHT-WHP

THE STATE OF ALABAMA, et al.,

Defendants.

DEMETRIUS NEWTON, et al.,

Plaintiffs,

vs CASE NO.: 2:12-CV-1081-WKW-MHT-WHP

THE STATE OF ALABAMA, et al.,

Defendants.

* *

NON-JURY TRIAL – VOLUME III

* *

BEFORE THE HONORABLE WILLIAM H. PRYOR, United States Circuit Judge, presiding, THE HONORABLE MYRON H. THOMPSON, United States District Judge, and THE HONORABLE W. KEITH WATKINS, United States District Judge, * * *

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* * *

[3-49] THEODORE S. ARRINGTON

The witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. ANDERSON:

* * *

Q. Okay. As a technical term – we've all heard gerrymander, but explain to the Court what you mean by the – that you thought the 2000 plan that was adopted by the Legislature was a [3-50] dummymander.

THE WITNESS: Your Honor, there's such a thing as being too smart for your own good, and sometimes legislatures do things where they think it's to their advantage, and they get greedy. And it turns out, after a while, that what they thought was to their advantage turns out to be to their disadvantage. And that's sort of what a dummymander is.

JUDGE PRYOR: Is that like being hoisted on your own petard?

THE WITNESS: That's correct, Your Honor.

And I had said in the deposition, and I still agree with this, that if the Republicans had come to me when the 2000 plan was being enacted, I would have been willing to be their expert witness to say that this is a bad plan. It has a number of bad features. One of them is it continues to pack the black districts. And I would have said that's something that shouldn't be done in 2000 and shouldn't be done in 2010.

Q. Why is packing bad and illegal?

A. Sure.

Packing restricts the black community to just those districts that are packed, so that, essentially, their ability to participate in the political process is limited. This is a state that's about 70 percent white. If you're restricted to just 25 to 30 percent of the districts in the Legislature, and you have no ability to form coalitions with whites, then your [3-51] ability to participate politically is restricted. It's not participating equally in the political process.

JUDGE PRYOR: Dr. Arrington, were you saying that the 2000 plan was packed?

THE WITNESS: Absolutely, Your Honor. In fact, the 1990 plan was packed. And Your Honor, the reason for that is that after the *Gingles* case, state legislatures understood that they had to create majority black districts. But we didn't know – and I include myself in that because I was drawing districts at that time – we didn't know what level of concentration was necessary to give minorities a reasonable opportunity

to elect candidates of their choice. Also, since that redistricting and since the 2000 redistricting, the ability of blacks especially to mobilize, to get registered and to actually get out and vote, has exploded. And the Chief Justice noted that when he declared Section 4 of the Voting Rights Act unconstitutional, that blacks are mobilized today at the same rate as whites. And if they're mobilized today at the same rate as whites, and you have a district that's just majority black by voting age population, and the cohesion of blacks tends to be 90 percent plus, and you're getting at least 20 percent of the whites to vote for them, that's plenty for them to have a reasonable opportunity to elect a candidate of their choice without restricting their ability to deal in the adjoining districts; to join with white Democrats and have a fighting [3-52] chance to win. Not a sure thing, but a fighting chance to win.

Q. You mentioned packing throughout your testimony. You also mentioned cracking. What do you mean when you say that they're cracking a district?

A. The process of gerrymandering is very simple. First you take the other guy's voters and pack them as much as you can. But you can't pack all of them into a few districts – some are left over – so you take the ones that are left over and you distribute them in the remaining districts in such a way as they're powerless there. So you pack and then you crack what's left over.

And you can see that in these plans, in the sense that in addition to the packing, they then took the remaining blacks and separated them so they were always less than about 35 percent of the population in any of the remaining districts. Which means that's small enough that blacks would not be able to say to white Democrats in such districts, hey, if we move together, we can win this district. But if you go to white – white officeholders, white voters and the like, and you say, coalesce with us and we can win this district, if that's not possible, then no such coalitions will ever be formed.

JUDGE WATKINS: Dr. Arrington, you said "these plans."

THE WITNESS: The enacted plans.

JUDGE WATKINS: Are you talking about historical plans, the two prior ones, or are you just talking about the plans that [3-53] are at issue in this case?

THE WITNESS: All three of them.

JUDGE WATKINS: The 1990, the 2000, and the current one?

THE WITNESS: But Your Honor, here's the difference. In 2000 Democrats were getting 35, 40 percent of the white vote. And if you're getting 35 or 40 percent of the white vote, then you can pack the black districts to some extent, you can engage even in some cracking, and the white Democrats can still win. But if the Democrats are only getting 20 percent of

the white vote, then it becomes a very different game. And that's what really changed.

That's why the Democrats did what they did in 2000, and they thought they were being smart. But once things changed, especially after 2010, then what looked smart in 2001 and 2002 turns out to have been very bad; especially bad for blacks because it means it cuts them off from the ability to form those coalitions that they have to have if they're going to be players in Alabama politics.

* * *

[3-56] Q. You had some criticism in your direct, and they asked you this on your cross, about what I call the 2 percent rule, which is 1 percent variance each side, vis-a-vis the 5 percent rule that – in previous plans. Can both of these percentages be manipulated, and, compound question, is one easier to manipulate than the other?

A. Just on the face of it, just on the face of it, there's more room for manipulation, good or bad, in the 10 percent rule than in the 2 percent rule. That's not the way the 2 percent rule has been used here, I think. I think the 2 percent rule was used as a way of saying, once we've done that, once we've said we have to pack these black districts because we won't get [3-57] approval from the Department of Justice, and we have to stay within 2 percent, that allows them to draw a plan which, essentially, has no redeeming features at all. If you say you didn't follow county boundaries, well, you can't. If you say you have to

shift a district out of Birmingham, well, you have to do that.

It's what I call the devil-made-me-do-it approach. It gives them protection against any argument that the plan is deficient on any basis, either when presenting it to the public or when presenting it to the courts.

Here's the problem, the way I see it. The Legislature can adopt a 2 percent plan. That's not on its face unconstitutional. I understand that. But you have to ask the question of some kind of proportions. The advantage of a single-member district system is that you're representing people, but you're representing them in terms of the places where they live and identify with. The district has a meaning because the people who live there know what it is and the representative knows what he represents or what she represents.

If you go to 2 percent, then you essentially create districts where they're all about the same size, same population, but they have no meaning. You can't say, well, this is the central Birmingham district and this is the – this is the Dauphin Island tourist district. They're just collections of people. Which it's one person, one vote, all right, but it [3-58] lacks any meaning.

And once you – once you've freed Mr. Hinaman to draw a plan which has no meaning at all, he can pack and crack as much as he wants to, and it doesn't

matter, because everything he did, the devil made me do it.

* * *

[3-69] CROSS-EXAMINATION

BY MR. WALKER:

* * *

[3-77] Q. * * * [3-78] And then in your direct testimony, in paragraph 44, you say Dr. Brunell, who has not testified yet but who will, has opined that the concentration at which the opportunity to elect as president would not be the same everywhere in Alabama. You agree with him, but then you say a minimum can be set that would apply everywhere, which seems contradictory to me, so I wanted you to explain that, but not just yet.

A. No. That minimum is 50 plus one. The point is that based upon Dr. Lichtman's testimony – he'll testify later – my own examination of the academic literature on Alabama elections and miscellaneous other voting rights cases in this state, it's clear that 51 percent minority VAP –

Now, we're talking VAP, not pop, remember –

Q. Right.

A. Pop would be somewhat higher than that.

Q. I understand.

A. – is enough to give minority voters that opportunity anywhere in the state. Now, in some

places in the state, that's more than you need. But everywhere in the state, that's enough.

Q. Then why do you come down here and later say, certainly 54-56 – and I assume you mean VAP concentrations – is enough?

A. Yes. Well, all I'm saying is, okay, if you want to fight about 51, you don't think that's enough, certainly when you get to 54 or 56, there's no longer any reason for anybody to doubt [3-79] it.

Q. And that would be statewide, you're telling the Court, without any variation according to where you are in the state?

A. No. I'm only saying if you want to fight about 51, if you don't think that's quite enough, all right. Maybe you go to 54 or 56. But 51 is enough. And Dr. Lichtman's data shows that. And that's all I'm saying in saying, you know, in some places you're going to have difficulty finding whites to bring into those districts. So if it drifts up to 54 or 56, that may be what you need to do.

Q. Look at this sentence that I'm indicating right here: A minimum can be set which would apply everywhere. Everywhere in Alabama.

What is that minimum? Where do you see that minimum?

A. It's 51 percent.

Q. 51 percent?

A. Yes. Or 50 percent plus one person, if you want to look at it that way.

Q. Okay.

A. I mean there is law that suggests that it has to be that if you're going to count it as a minority district. And I say that in the report as well, that it may be that there is a legal standard that requires it to be majority minority in that sense. And that's – you know, that's the *Bartlett versus Strickland* case. So okay. So up it to that. But in some places in [3-80] Alabama, that's not what you need politically.

Q. And above that you would consider packing?

A. Above that considered packing? Again, you look at – if you can make it – if you can do that. If there are places in the back belt where you can't do that, then you might have to go a little bit above that. And that's understandable.

* * *

[3-87] ALLAN J. LICHTMAN

The witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

* * *

[3-98] CROSS-EXAMINATION

[3-99] BY MR. DAVIS:

* * *

[3-107] Q. Here's the question, Dr. Lichtman. If you're using 46.5 or 53 percent voting age population –

A. Yes.

Q. – would you disagree, then, with Joe Reed, who said that in his view, you need about 60 percent?

A. For these districts, I would absolutely disagree, and I think the numbers more than bear that out.

Q. Would you disagree with black legislators who said they thought that they should have 65 percent or so?

[3-108] A. I've been redistricting advisor to a number of states, and my experience is no legislature – legislator ever thinks they're safe enough. They don't want to be 99 percent safe. They want to be 99.99999 percent safe. So I'm not –

Let me finish.

I'm not surprised if what you say is true, but that is not an analysis based on the evidence.

Q. You don't know –

JUDGE PRYOR: No. It is. It is based on the evidence –

THE WITNESS: Yeah, right.

JUDGE PRYOR: – isn't it?

THE WITNESS: Yes, for 99.999999 –

JUDGE PRYOR: You want a safe district. That's the evidence, right?

THE WITNESS: Even then, sometimes strange things happen.

BY MR. DAVIS:

Q. You don't know of any African American legislators, then, who are saying that they want a district that's in the mid forties or that they can win a district that's in the mid forties?

A. I'll answer your question. I don't know what any African American or non-African American legislator has said about anything, because that's not within the scope of my analysis.

* * *

[3-114] RANDY HINAMAN

The witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

[3-115] BY MR. PARK:

* * *

[3-116] the Legislature and precleared by Justice.

Q. And then in 2012, how did you get – after the 2010 census, how did you get involved with redistricting in Alabama?

A. Congressional?

Q. Yes, sir.

A. I was hired by the seven members of the Alabama congressional delegation to draw a map for them that we would share with the folks in Montgomery and work with the Legislature to get something similar to that adopted.

Q. And was that plan passed by the Legislature and signed by the governor?

A. With changes, yes, sir.

Q. And is that the plan that was used in the 2012 congressional [3-117] elections?

A. Yes, sir.

Q. And in 2012, you worked with the entire delegation?

A. Yes, sir. Six Republicans, one Democrat.

Q. And each of those plans was a statewide plan; is that right?

A. Yes, sir.

Q. And each of those plans, being congressional plans, was drawn with zero tolerance?

A. Zero deviation. Yes, sir.

Q. After doing the congressional plan, one question that has come up, did you have any involvement with the State Board of Education plan in Alabama?

A. I did not. I did not draw that plan.

Q. How did you come to be involved in working on the legislative plans for Alabama?

A. Well, after working on the congressional with Senator Dial and chairman – and also Representative McClendon, they talked to me and leadership talked to me about helping out with the legislative districts. Speaker talked to me about helping out as well.

Q. And what kind of schedule did you have?

A. I went to work, basically, September – early September of 2011, yeah, and then worked through the session, end of the session, May 2012.

Q. How did you get started?

[3-118] A. Got started, came down and did a meeting with leadership and Senator Dial and Representative McClendon and talked about some of the rules, the guidelines that were in place that the committee established, as well as some other procedural things that we talked about. And then I went back and started drawing – roughing out a map where I could come back and meet individually with members and fine tune it from there.

Q. Before you were in a position to show a map to anybody, what did you have to do mechanically?

A. Well, mechanically, I wanted to get some vote performance data in so I could look at the various – how districts would perform. So I had to apply election returns from the last eight or so general elections into the plan by precinct. Which obviously, is somewhat more complicated the further back you go, because precincts names change and so forth. So that took a while. And then I roughed out a plan where everything was basically within deviation so that somebody could look at their district in deviation and go from there.

Q. You mentioned some guidelines. What do you recall about the guidelines with respect to deviation?

A. Well, we were overall deviation of 2, plus or minus 1.

Q. And what with respect to any other guideline?

A. Well, the other guidelines were to follow the Voting Rights Act and to not retrogress the overall total number of African American majority districts, as well as to try individually to [3-119] not retrogress the individual districts from the numbers that existed in 2001.

Q. And by retrogress, did that mean that the percentage of total population couldn't come down?

A. I looked at – yeah. Essentially, I tried where possible to not lower the total population of African American population in those minority majority districts.

Q. And what was your reference point?

A. Reference point was 2010 census in 2001 districts.

Q. In the work you did loading information, did you have incumbent addresses?

A. I did have incumbent addresses. Unfortunately, a couple of them ended up either being their office address when it should have been their home address, and they needed to be sorted out at the very end. But, yes, sir, I did have incumbent addresses. And I was also instructed that we were not putting incumbents together to the extent we could avoid it.

* * *

[3-122] BY MR. PARK:

Q. Mr. Hinaman, when you started work on the Senate plan, which districts did you start with?

A. Well, I started with the majority African American districts [3-123] first. And then, obviously, after that, worked around the edges of the map and moved inward, for the most part.

Q. Which are the black majority districts in this plan?

A. In this plan, that would be 18, 19, and 20 in the Jefferson County area; 23 and 24 and 28 and 33 in Mobile.

Q. And also 26?

A. And 26 in Montgomery. Yes.

Q. And when you started work for all – what was the nature of the population status of these black majority districts?

A. They were all underpopulated in comparison to ideal, and I had to find population to repopulate them.

Q. And as a general matter, where would you find that population?

A. Well, obviously, it has to be contiguous, so it would be in a neighboring district by definition.

Q. Now, as you worked on – let's start with Senate District 23 and 24. Senate District 24 was underpopulated. What did you try to do with that?

A. Well, I believe I moved – took it down further into Choctaw and Clark, rural areas, and also took it – about half of Pickens County and put it in there. Probably a little bit more in the Tuscaloosa area, although the differences aren't – it's in more of an urban area, so it doesn't look that different, but it added a few precincts in there as well.

Q. Let me direct your attention to Senate District 30 at this [3-124] time. Senate District 30 includes Butler County, Crenshaw, Pike, and goes through Lowndes to Autauga and Elmore County; is that right?

A. That's correct.

Q. What did you do with Senate District 30?

A. I thought that that – a number of those districts were all underpopulated south of Montgomery, and I thought that what would make the most sense would be to draw a more compact District 30 north of Montgomery. So those areas, including Lowndes, that were south and west of Montgomery were put in other districts. The rest of Lowndes and Butler went in 23, Crenshaw went into 25, and Pike went into 31.

Q. Now, what happened when you pushed Senate District 24 north into Pickens County?

A. Obviously, that had the effect of also moving Senate District 21 north into Lamar.

Q. And in connection with that, was Senate District 5 underpopulated?

A. It was. And obviously, it couldn't very easily go directly east because of the three African American senate districts in Jefferson County, so it took up part of Fayette County or all of Fayette County.

Q. And when you take Lamar and Fayette County away from Senate District 6, what happens?

A. Well, it was obviously – considering started [3-125] underpopulated, and once you did that it was even further underpopulated. Again, about the only place it could go was north, so it went north into Senate District 1.

Q. What was the status of Senate District 2?

A. Senate District 2 was very much overpopulated. I think close to like 40,000 citizens. So 1 moved into 2, the northern part of 2.

Q. And you had to redistribute the population in 2 to meet the ideal population; is that right?

A. That's correct.

Q. So you moved 30 north of Montgomery, and you redistributed down here. When you moved Senate Districts 23 and 24 south into Choctaw and Clark counties, what happens to 22?

A. Well, obviously, it needs population, but that works out well because Senate District 32 in Baldwin County was very overpopulated. So basically, everything north of I-10 in Senate District 32 went into Senate District 22 in Baldwin County.

* * *

MR. PARK: The 2012 proposed map for the 2014 plan.

Q. Again, starting with Senate Districts 23 and 24.

A. Yeah. They picked up population – well, Senate District 2 went north into Pickens and picked up a few extra precincts in Tuscaloosa, and then it went south into the northern part of [3-126] Clark and a considerable amount of Choctaw.

Q. And 23?

A. And 23 picked up the rest of Lowndes, picked up Butler, and picked up a little bit more of Clark, I believe.

Q. And what happened to Crenshaw County?

A. Crenshaw went into Senate District 25, and Pike went into Senate District 31.

Q. And 30 went on north –

A. 30 went all north of Montgomery, which had the effect of pushing Senate District 11 further north as well.

Q. And then 21 moves north into Lamar County; is that right?

A. Yes, sir.

Q. And 5 moves west into Fayette County?

A. Yes, sir.

Q. What happened with Senate District 6?

A. Senate District 6 moved north into Lauderdale County –

Q. And Senate District 1 –

A. – and a portion of Lawrence.

Q. And then Senate District 1 moves along –

A. Moved east along the top of the map into Limestone and also into a little bit of – portion of Madison.

Q. Let's look at what's been marked as Exhibit 469. Can you tell me what this is.

A. That would be a blow-up of the senate districts that I was given by Senator Dial, who told me that Senator Smitherman had [3-127] given him that map of the three majority African American senate districts in Jefferson County.

Q. And did you try to put Senator Smitherman's map into the Senate plan?

A. I did. I think I – I mean percentages are hard to use, but I put, you know, 95, 97 percent of it into the Senate map.

Q. What part of the – of Senator Smitherman – did you change any of the internal boundaries in Senator Smitherman's map?

A. If I did, it was unintentional. I tried to follow those lines entirely. And I got no feedback that I was wrong, so I think I did those correctly as that map represents.

Q. And what changes did you make in Senator Smitherman's map?

A. The biggest visible change is these few precincts to your left sticking out this way were precincts that were in Senator Reed's Senate District, Senate District 5, I believe, and he wanted to keep those like two or three precincts. In exchange for that, obviously, I had to have equal population, put in

two or three precincts at the very southern tip of Jefferson County.

Q. And were those precincts the Rock Creek Church Road –

A. They were.

Q. – in this area and Rock Creek Church Road to what would be the west?

A. Yes, sir.

Q. And are those precincts majority white or majority black?

A. Majority white.

[3-128] Q. And the precincts to the south that you added to Senator Smitherman's district, are they majority white or black?

A. Majority white.

* * *

[3-130] Q. And then Senator Ross's district, did it keep the core of his old district?

A. It did. Although geographically that looks like a large area, which it is geographically, but populationwise, it's not that large. But, yes, he kept the bulk of his core district and then added some precincts in the city of Montgomery to get back to ideal population.

Q. Now, when you created the land bridge and took population from the south part of Montgomery

County, was that population white and black – white or black?

A. It was probably about 65 percent white.

Q. And in the course of repopulating Senator Ross's district, did you put white folks and black folks back in the district?

A. I did.

Q. And they came in from other parts of the new district; is that right?

A. Yes. Came in from other parts of 25 in the city.

Q. Let's go to tab eight. And what I'll represent to you is this is the southwest Alabama Senate districts.

A. Yes, sir.

Q. And as you look at the old districts, what constraints – Senate District 33 is a black majority district. That's the district of Senator Figures. Were there any constraints on what you could do with her district in repopulating it?

[3-131] A. Well, there were some constraints. One, we didn't want to cross the bay into Baldwin County, so we couldn't really go east. The two senators – the senator who represents District 34, Senator Glover, lives essentially north – well, sort of northwest of 33, and the senator who represents District 35 at that time, Senator Brooks, lives southwest of 33, so

going west was somewhat problematic in terms of going into their neighborhoods. And going north could have had the unintended consequence of cutting off the transportation, shall we say, from District 22 to Escambia County, so that was somewhat problematic. So going south was essentially the easiest course.

Q. Let's look at the new district. And –

A. New District 33?

Q. Well, new districts in this area. What changes did you make to District 35? That would be Senator Brooks' district, former district.

A. District 35, I believe, picked up some of the western part of Mobile County and lost some of its northern – northeastern part to Senate District 33.

Q. And then what effect did the change in Senate District 35 have on Senate District 34?

A. Pushed it a little further north; took up a little bit further north part of the county.

Q. Now, when you talked about the transportation or the land bridge, is that the kind of green between Washington County and [3-132] Baldwin County in District 22?

A. Yes, sir.

Q. Now, with respect to 22, Senator Sanders and Senator Singleton had pushed it south, and Senator – the Mobile districts moved it up out of Mobile

largely. Where did you get the additional population for Senate 22?

A. The additional population for Senate 22 came from northern Baldwin County.

Q. And was that area – was Senate District 34 – 32 overpopulated?

A. Yes, sir.

Q. I'd like to direct your attention now to the House plan. One of the issues that's come up is the movement of House District 53 from Jefferson County to Madison County. Did you recommend that move?

A. I did.

Q. And as far as whether that move was made or not, was that your call, or whose call would that have been?

A. Well, ultimately it was the Legislature's, but initially it was Representative McClendon's.

Q. And why did you make that recommendation?

A. Because every one of the minority majority districts in Jefferson County were underpopulated, some quite dramatically. And when we looked at it as a whole, they were around 70,000 folks short of ideal, those districts added together, which is [3-133] basically a district and a half. And looking at the map, I knew that most of the – if not all of the minority neighborhoods were already included in those

districts. So trying to repopulate them to get them back to deviation was going to retrogress most if not all of them, some of them maybe to the point where I was very concerned about Section 5 preclearance of the plan.

* * *

Q. And as a general matter, how did the black majority Senate [3-134] districts and black majority House districts in Jefferson County correspond? Do they occupy similar space?

A. They do.

Q. With respect to moving House District 73 to Shelby County, was that your recommendation?

A. It was, and it was also a feature of the map that Representative McClammy had given Representative McClendon to give to me.

Q. Why move – why move a district to Shelby County, a House district?

A. Well, two reasons. One, we needed population to repopulate the three majority black districts in Montgomery County, and the only – or most of the only logical population was in 73. Obviously, why move it to Shelby County? That was the fastest growing county in the state, I believe. And it also – every district whole or part that was in Shelby County was overpopulated, so something was going to need to take – one district there, I think, was dramatically overpopulated. House District, I think, 41. So it made

sense to move that district to a much faster growing area.

Q. And you talked about the McClammy map. Are you familiar with the concept of the package that Mr. McClammy gave Mr. McClendon?

A. I am.

Q. And what was the nature of that concept?

[3-135] A. It was a map, a couple of maps, and then corresponding demographic information.

Q. And did that demographic information include House District 73?

A. It did not. He drew the districts inside Montgomery County without a District 73.

Q. Did you use that concept in drawing the districts in Montgomery County?

A. I did. Obviously, it wasn't identical, because I also had to bring in House District 69, which is another majority African American House district that was short of population, so that changed the nature of it slightly, somewhat. But I tried to use the concept of using District 73 to repopulate the minority districts in Montgomery County.

* * *

[3-136] Q. You come up with a plan. What involvement did you have with the plan after it was produced and in the hands of Mr. McClendon and Senator Dial?

A. I was here during the session, and when there were changes that were made to the map, I would – I didn't do all of them, but I sat down with some of the legislators who had changes that they wanted made and remade them.

Q. Like who did you sit down with?

A. I sat down with Oliver Robinson; Patricia Todd; Mary Moore was on the phone with Oliver Robinson when I did that. I may have sat down with Marcel Black and a couple of changes that were made in that area.

Q. And Mr. Robinson and Mary Moore and Patricia Todd, are they all representatives from Birmingham?

A. Y[illegible], sir.

Q. And what about Mr. Black and the folks there? Where are they from?

A. Those were changes in Lauderdale and Colbert County.

[3-137] Q. And is Mr. Black a Republican or Democrat?

A. Democrat.

Q. How about Mr. Robinson, Ms. Moore, and Ms. Todd?

A. Democrats.

Q. Can you think of anybody else you worked – helped work with?

A. Well, I made a few changes, again, to the map because I had had a couple of people who were outside their district because I had the wrong address. Or in one case, my computer program, Maptitude, put it in a different place than the state's computer program. So to be sure, I went back and made some minor corrections to make sure everybody had their own district to the extent possible.

JUDGE PRYOR: Do you know the race of those legislators with whom you made those changes in Birmingham and then the Lauderdale and Colbert counties?

THE WITNESS: Yes, I do. Oliver Robinson and Mary Moore are African American, and Patricia Todd and Marcel Black are white.

Q. And in the course of your work, to the extent you got input from legislators or from legislators through Senator Dial or Representative McClendon, do you think you carried out the wishes of those legislators?

A. Well, as you well know, no one gets everything they want in redistricting. But to the extent possible, I tried to, yes.

* * *

[3-138] MR. BLACKSHER: It's going to take longer for me to move this than it is for the examination, but let me do it.

APX 75 is Mr. Hinaman's deposition, and I move its admission.

MR. PARK: No objection, Your Honor.

JUDGE PRYOR: It's admitted.

MR. BLACKSHER: APX 68 is Mr. Hinaman's declaration, and I move its admission.

MR. PARK: No objection, Your Honor.

JUDGE PRYOR: It's admitted.

* * *

CROSS-EXAMINATION

BY MR. BLACKSHER:

Q. To be clear, Mr. Hinaman, your instructions were to pursue two goals: One, not to retrogress the size of the black [3-139] majorities in the majority black districts, and two, to the – I think you said to the extent possible, to comply with the wishes of incumbents with whom you met; is that correct?

A. That's correct. There were more goals than that, obviously. To stay within deviation and –

Q. Plus or minus 1 percent?

A. Yes. And comply to the extent possible with the guidelines set forth by the reapportionment committee.

Q. But as you said in your deposition, to the extent that the guidelines called for trying to preserve county boundaries, that was subordinated to these other goals; isn't that correct?

A. Certainly to one person, one vote. Yes, sir.

* * *

[3-142] Let me ask you this. When you were attempting to bring all majority black districts up to the size of the black majorities with 2010 census on top of 2001 plan – and you were reaching out to find black precincts, right?

A. Yes, sir.

Q. I did not ask you in your deposition this question, so let me ask it now. When you were trying to make – get the black population you needed, did that mean that you could only pick up a precinct that was majority black, or was there some cut point where you decided the precinct would not serve your purpose?

A. I'm assuming you're not referring to this map anymore, and you're talking about –

[3-143] Q. No. I'm not referring to this map anymore.

A. No. When I was adding population to majority black districts, my goal was not to retrogress the number that they had in 2001, meaning 2010 census, as applied to the 2001 lines. And in toto, whatever I added to a various district, I would look to see what change that made to the overall black percentage in that district. And so in some districts I could add in anything I wanted, and it didn't matter because they were – you know, either they didn't need that much population, or the changes I added didn't matter. But, yes, where it was something that I was concerned about retrogressing, I did look at the nature of the precincts I was adding, certainly.

Q. Yes. So, I mean, and we had an earlier demonstration. Bill Cooper showed how the Maptitude works. When you're doing it, as you take a precinct and add it, let's say, to – the majority black district we're talking about here is Senator Sanders' SD 23. Okay? And as you put a precinct into SD 23 with Maptitude, it pops up – you look at the table and see how much that's increased the black percentage. Right?

A. Correct. Yes, sir.

Q. And if that precinct did not increase the black percentage, or at least it didn't increase it as much as you wanted, you would simply split the precinct and go down to the block level and look for a majority black block or several blocks.

A. Well, that's a little bit of a simplification. I mean, I [3-144] tried to look at the additions en

masse, not just a precinct. I may add a white precinct, a majority white precinct and a majority African American precinct; but if you look at the end number, if it did not retrogress the overall end number for that precinct, then they were added in. If for some reason they retrogressed that number, then, yes. So I would split precincts.

Q. And when you split precincts, you would have to go to the block level?

A. Yes, sir.

* * *

[3-145] JUDGE THOMPSON: Let me ask you this. How do you define retrogression?

THE WITNESS: I define it, in terms of my work, in two ways: One, not lowering the overall total number of majority African American districts in either plan. Actually, we added one in the House plan. The number stayed the same in the Senate plan. And then looking at 2010 census as applied to 2001 lines, [3-146] whatever that number was, I tried to be as close to that as possible. And if I was significantly below that, I was concerned about that being retrogression that would be looked upon unfavorably by the Justice Department under Section 5.

Q. And you've had experience dealing with the Justice Department in preclearance proceedings in other cases?

A. I've drawn plans that were precleared. Yes, sir.

* * *

CROSS-EXAMINATION

BY MR. TANNER:

* * *

[3-149] Q. Did you – were you aware of any related studies, for example, about variations among the state's black communities in terms of voting or anything else?

A. Well, "anything else" covers a lot of subjects, but I was –

Q. I'll be more specific. How about socioeconomic characteristics such as income, type of employment, educational level achieved?

[3-150] A. I did not look at those factors.

Q. Attitudes?

A. No, sir.

Q. Did you obtain or already have any information about the black population, variations in the black population in various areas such as Birmingham and Mobile, any differences?

A. Differences in terms of?

Q. Of any of the characteristics I've mentioned: Either voting or education, employment, types of employment.

A. No, sir.

* * *

[3-164] A. No. I don't believe – I tried to draw those districts as close to the numbers as possible and practicable as they were in the 2001 plan to avoid problems with potential Section 5 preclearance.

* * *

[3-173] Q. And Talladega County was intact. And so you substantially reconfigured both districts, changing the core or changing the configuration of both districts fairly dramatically.

A. Well, I wouldn't say the core, but it changed the configuration of both districts.

Q. Both districts dramatically. And you know from campaigning around the state that there's a lot of difference between Talladega County and Shelby County.

A. Yes, sir.

Q. And the – basically, it moved a black majority population out of Talladega County in Senate District 11 and put it in [3-174] rapidly growing, heavily white Shelby County. Correct?

A. Or put it into Senate District 15.

Q. Yes. To Senate District 15 with the Shelby County voters, the Shelby County dominated district.

* * *

[3-180] Q. Well, didn't your data from the Obama election give strong indication of that?

A. I didn't specifically look at it, but I'm sure it would have.

Q. But didn't even look how your black majority districts had performed in any election?

[3-181] A. I was more concerned in drawing minority districts as to whether I was retrogressing the overall population, black percentage, than voter results.

Q. So you only looked at the voter results of the Obama race and the lieutenant governor's race when you were looking at the white districts.

A. Well, "only" is a dangerous word, but that was not primarily what I was looking at when I was drawing the minority districts. You're correct.

* * *

[3-182] Q. But I believe you indicated that you did not examine that issue; that is, whether it was necessary – how these districts performed in the Obama election, for example.

A. That's correct. I looked more at the overall number and whether I was retrogressing the total black population in those districts.

[3-183] Q. And by the overall number, you mean –

A. Total population.

Q. – total population black?

A. Yes, sir.

Q. And by retrogressing, you mean lowering that percentage?

A. Yes, sir.

* * *

[3-186] identical numbers that they were 10 years ago.

Q. The identical?

[3-187] A. By total black percentage.

* * *

[3-191] TOM BRUNELL

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PARK:

* * *

[3-197] Q. Can you tell us why you favor one person, one vote over other considerations?

A. Some of the other – I mean I just – you know, kind of trying to think of them as in some sort of hierarchy, I think a lot of the other ones – for instance, like communities of interest – for me come at a much lower level than one person, one vote.

One person, one vote is sort of where we started in the 1960's. This is what got the courts involved in redistricting, and I think the underlying notion of equal voting power is critical. I think it makes perfect sense, and it's something that we should put ahead of some of these other things like a community of interest.

I mean, I've heard – I mean, anything can be a community of [3-198] interest. Right? I mean, so at some level, the notion has lost any worth at all. I've heard – I was involved in a Texas case where a lawyer was saying, well, our communities of interest are what the districts looked like in the 1950's. So at that point, for me, the notion of a community of interest, once anything can be a community of interest, well, I'm no longer interested in that because it has no value at all to anybody involved.

So communities of interest, for instance, I think are less important. Compactness is less important than one person, one vote. Protecting artificial lines like municipal lines or county lines is less important than equalizing voting power, in my opinion. I'm sure some people disagree with me.

For me, those – I think that those things come at a secondary level or even a tertiary level relative to equalizing voting power of residents; of citizens.

Q. The 2001 and previous plans used plus or minus 5, and these plans use plus or minus 1 as far as overall deviations. Which do you prefer?

A. I prefer no deviations, but I vastly prefer a plus or minus 1 deviation over plus or minus 5.

Q. Why do you prefer the smaller deviation to the larger?

A. *The only* – any deviation that we pick is necessarily arbitrary. Right? One percent is arbitrary. Five percent is arbitrary. You know, 2.2968 is arbitrary. Whatever we pick is arbitrary. You get back to, why 5? Why not 5.5? Well – you [3-199] know. So drawing these arbitrary bright lines is very, very difficult, whereas if we have zero population deviations, that's immediately defensible and obvious to everyone.

So that's one of the major reasons I prefer it. But then also because I favor equalizing voting power across – you know, across the state, across districts within the state, for all the citizens.

Q. Is a smaller deviation related in some way to the ability to generate a political gerrymander?

A. Yes. Yeah, that's another key reason, is that this was kind of a very simple tool that we've kind of handed over to map makers to fiddle with, to use for partisan purposes. Right?

And the Court talked about it earlier. Right? I mean, if you're gerrymandering, you are underpopulating your own districts, right, because you want to use your population more efficiently and overpopulate the opposition's districts.

Q. And the larger deviation allows you to do that.

A. Yeah. That's right.

Q. Now, are you saying that a zero deviation plan can never be politically gerrymandered?

A. No. You could still gerrymander a zero deviation plan. But it is one tool that we can take away. Right? This is just like a wrench in the toolbox. Get rid of that wrench, and then we can strain the map makers in very useful ways.

* * *

[3-219] JAMES H. MCCLENDON

The witness, having first been duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PARK:

Q. Would you please state your name for the record.

A. James H. McClendon.

Q. And are you a member of the Alabama Legislature?

A. Yes, sir, I am.

* * *

[3-220] Q. Were you member of the reapportionment committee?

A. Yes, sir.

Q. How did you become a member of the reapportionment committee?

A. Appointed by the speaker.

Q. And were you appointed to represent a particular district, or were you appointed at large?

A. I believe I was an at-large member.

Q. And how were you – were you selected as chair, cochair of the committee?

A. I was selected as House chair, which made me – that would be chair of the House Reapportionment Committee, which made me cochair of the joint committee. That was done by an election of the committee members.

Q. You've been in the courtroom throughout the trial, and you've heard the testimony about the adoption of the guidelines. What's your view about the appropriateness of using [3-221] plus, minus 1 percent as the overall deviation?

A. Well, just makes good sense to me. If you're interested in one person, one vote, that's a lot closer than 5 percent, or actually, plus or minus 5, which gives you 10 percent deviation. You know, we had already gone through this with the congressional, which has zero percent, and state board of education

with 1 percent. And we went right through with DOJ preclearance, so I didn't have a problem at all with 1 percent. It made sense to me.

Q. And you've heard testimony about the Voting Rights Act. What was your understanding of what the state wanted to do with respect to Section 5 and its obligations under Section 5?

A. On the Voting Rights Act – are we talking about retrogression now?

Q. Yes, sir.

A. Well, my understanding of retrogression is that a district or – an individual or district is retrogressed if the minorities in that district, whether by race or language, are worse off after redistricting than they were before redistricting. And of course, we don't have any minorities by language, so it's a racial thing.

Q. And was the goal of the redistricting effort to get the approval of the Department of Justice?

A. Yes, sir. We knew that we were going to be subject to preclearance by DOJ, and we knew that was a major hurdle.

[3-222] Q. Did you know exactly what DOJ looked for when it reviewed plans?

A. Well, when it came to retrogression and talking about percentages, to the best of my knowledge, there wasn't any hard numbers. There were relative numbers, but there were not any hard numbers.

There was nothing that said 50 plus – 50 percent plus one is okay. In fact, my impression was that was not the case. So really, what we targeted was we tried to look at the 2010 census, overlay it on the districts, and try not to change the percentages of the citizens, the black citizens, in a district any more than we had to. Tried to keep them in about the same proportion as they were.

* * *

[3-223] Q. And you heard testimony from Senator Dial that he offered to meet – or that he met with every one of his 34 colleagues to talk about the new districts. What kind of offer – or what did you do about meeting with your colleagues?

A. I made the offer to all 104 members of the House to come sit down and either work with Mr. Hinaman or myself. As far as the Democrats, I went to Representative McCampbell, who is minority chair, I guess, of the House caucus, black caucus. I spoke to him personally on the House floor. Informed him that I was available. I did the same thing with Representative Craig Ford, who was minority chair for the Democratic caucus in the House. I offered that to them. I gave them a phone number to call and [3-224] set up a time with the lady that worked with me up in my office, and we set up schedules. Did the same thing with the Republican members in my caucus. So I made the offer to every House member. Not every House member came.

Q. And Mr. Hinaman testified that he met with Republicans. Did you meet with any of the Democrats?

A. I met with all of them that wanted to meet. I made myself available to them.

* * *

[3-225] Q. Okay. Let me direct your attention to State DMC 001517 of Exhibit 459. Can you tell us what this is?

A. Well, that's pretty typical of what I did. In this case, we had – I wish I knew who 98 is. I'm looking at the bottom, and I can't read that signature. But there was someone who wanted – this was discussing how to put these districts together, and there were common lines in there. And this was a pretty good example. I believe this involved people from two different parties that sat down and worked out how they wanted to work out a common line. And as long as they could do that without affecting the deviations, I would turn this over to Mr. Hinaman and ask him to do his best to incorporate it into what he had in his computer. But this is pretty typical of the way I went about doing this. And in this case, we had both of [3-226] them initial it.

Q. And the two districts that are involved are House Districts 102 and 98; is that right?

A. That's –

Q. Does that appear to be?

A. Correct.

Q. Let me show you what has been marked as 480, the 2001 House plan, and direct your attention to Mobile. Is that what we're talking about, District 98 and the contiguous district to its north, District 102?

A. That would have to be.

Q. And does the note on 1517 read: Please move from HD 98 to HD 102. This move has been approved by Rep. C. Fincher and Rep. N. Bracy.

A. Yes.

Q. Those two.

A. Fincher is Republican, Bracy is the Democrat, and they just got together and worked out something. That's what they wanted to do.

Q. And is Fincher a white Republican?

A. Yes, sir, he is.

Q. And Bracy is a black Democrat?

A. That is correct.

* * *

[3-229] Q. Let me go back a step or so. Did you get anything from Mr. McClammy with respect to the Montgomery area House districts?

A. Oh, yes, sir, I certainly did.

Q. What did you get from Mr. McClammy?

A. He brought a really nice map. And it was a big map. It wasn't one of these small, you know, letter size maps. It was a big map. And I took a look at that map, and he said that he had had – he and the other – I believe the other black legislators [3-230] in Montgomery County had agreed upon this and thought it was a good plan. And so I turned that over to Mr. Hinaman and asked that he see what he could do to work it into the Montgomery area for representation.

Q. What did Mr. McClammy tell you about using that plan or any other?

A. You know, he mentioned another group, minority, black folks, that had maybe had some maps, and he suggested that his map would be a better map.

* * *

[3-234] Q. In adopting the overall deviation of plus/minus 1, did you have any intention of discriminating against the African American voters of Alabama?

[3-235] A. Absolutely not.

Q. And in putting together the House plan, did you have any intent to discriminate against the African American voters?

A. I did not.

* * *

[3-246] CROSS-EXAMINATION

BY MR. TANNER:

* * *

[3-257] Q. And in terms of Voting Rights Act, I believe the testimony is that the state Legislature focused solely on the black percentage in terms of the majority black districts in terms of drawing those districts.

A. I would agree with that statement.

* * *

APX 6

Redistricting Population Comparison
Alabama State House – 2002 Plan Compared to Act 2012-602 Plan (2010 Census)

2002 Plan					Act 2012-602 Plan				
District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black	District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black
001	47247	8627	18.26%	16.45%	1	45968	7143	15.5%	14.06%
002	45462	1067	2.35%	2.10%	2	45486	1919	4.2%	3.92%
003	42348	8277	19.55%	18.28%	3	45972	11136	24.2%	22.92%
004	51181	5074	9.91%	9.63%	4	45083	5959	13.2%	12.23%
005	48495	4992	10.29%	9.82%	5	45403	5846	12.9%	12.37%
006	57674	17734	30.75%	29.93%	6	45796	7731	16.9%	16.97%
007	40956	4072	9.94%	9.79%	7	45089	1855	4.1%	3.97%
008	42351	11316	26.72%	24.03%	8	45083	9248	20.5%	18.58%
009	45371	1195	2.63%	2.39%	9	45083	964	2.1%	1.87%
010	50267	8341	16.59%	15.28%	10	45110	7468	16.6%	15.26%
011	44104	247	0.56%	0.38%	11	45282	334	0.7%	0.47%
012	45798	783	1.71%	1.57%	12	45070	726	1.6%	1.51%
013	39882	2951	7.40%	6.66%	13	45070	2978	6.6%	5.96%
014	40597	1571	3.87%	3.40%	14	45073	1305	2.9%	2.45%
015	48965	7848	16.03%	14.88%	15	45893	6387	13.9%	12.36%
016	40993	4542	11.08%	10.42%	16	45080	4803	10.7%	10.95%
017	42595	1364	3.20%	3.03%	17	45082	2026	4.5%	4.15%
018	43784	2066	4.72%	4.55%	18	45585	2618	5.7%	5.59%
019	42380	29685	70.04%	67.70%	19	45081	27727	61.5%	60.15%
020	47531	1570	3.30%	3.01%	20	45808	1852	4.0%	3.65%
021	48999	13492	27.54%	24.91%	21	45614	4050	8.9%	8.07%
022	48959	2996	6.12%	5.67%	22	45872	2772	6.0%	5.62%
023	43186	1823	4.22%	3.72%	23	45972	1954	4.3%	3.74%
024	48127	819	1.70%	1.45%	24	45972	791	1.7%	1.46%
025	64950	10726	16.51%	16.41%	25	45709	7490	16.4%	15.90%
026	52448	844	1.61%	1.26%	26	45721	805	1.8%	1.47%
027	47288	934	1.98%	1.67%	27	45827	838	1.8%	1.54%
028	40514	7559	18.66%	17.53%	28	45887	13718	29.9%	28.05%

2002 Plan					Act 2012-602 Plan				
District	Population	NH DOJ	% NH	% NH DOJ	District	Population	NH DOJ	% NH	% NH DOJ

		Black	DOJ Black	18+ Black			Black	DOJ Black	18+ Black
029	43353	7730	17.83%	16.75%	29	45910	1762	3.8%	3.11%
030	44979	1910	4.25%	3.66%	30	45216	2106	4.7%	4.07%
031	46434	9880	21.28%	20.08%	31	45842	7379	16.1%	15.23%
032	38800	23133	59.62%	56.97%	32	45504	27450	60.3%	57.68%
033	43809	10601	24.20%	22.27%	33	45905	9925	21.6%	19.87%
034	50560	786	1.55%	1.35%	34	45386	852	1.9%	1.62%
035	44612	7039	15.78%	14.46%	35	45957	7571	16.5%	15.18%
036	46065	6613	14.36%	12.80%	36	45957	5788	12.6%	11.28%
037	43958	9357	21.29%	19.94%	37	45966	13623	29.6%	28.07%
038	44337	13409	30.24%	28.80%	38	45968	8390	18.3%	17.13%
039	46905	2164	4.61%	4.21%	39	45968	2584	5.6%	5.08%
040	49653	5895	11.87%	11.62%	40	45932	6246	13.6%	13.19%
041	73181	8191	11.19%	10.60%	41	45092	5561	12.3%	11.63%
042	48338	5639	11.67%	10.80%	42	45966	5149	11.2%	10.41%
043	56056	4185	7.47%	7.02%	43	45209	3052	6.8%	6.48%
044	48707	14447	29.66%	25.54%	44	45088	5278	11.7%	9.87%
045	42890	15444	36.01%	31.72%	45	45087	6983	15.5%	14.03%
046	50398	4592	9.11%	8.43%	46	45316	3498	7.7%	7.17%
047	48011	7898	16.45%	14.65%	47	45578	9273	20.3%	17.77%
048	54047	4750	8.79%	8.17%	48	45592	2644	5.8%	5.85%
049	52014	6385	12.28%	11.59%	49	45877	6069	13.2%	12.60%
050	55378	5507	9.94%	9.77%	50	45961	3981	8.7%	8.60%
051	48552	6406	13.19%	10.98%	51	45073	2762	6.1%	5.33%
052	43159	25934	60.09%	58.52%	52	45083	27077	60.1%	57.21%
053	35378	19708	55.71%	52.49%	53	45106	25372	56.2%	52.88%
054	34905	19817	56.77%	53.37%	54	45070	25651	56.9%	52.50%
055	35572	26159	73.54%	71.22%	55	45071	33153	73.6%	70.60%
056	41064	25566	62.26%	59.42%	56	45071	28069	62.3%	59.71%
057	36199	24792	68.49%	66.52%	57	45071	30890	68.5%	65.98%
058	37443	29238	78.08%	74.02%	58	45088	32903	73.0%	67.99%
059	32838	22013	67.04%	64.25%	59	45218	34739	76.8%	74.28%
060	36704	24822	67.63%	65.15%	60	45084	30594	67.9%	65.68%

		2002 Plan					Act 2012-602 Plan		
District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black	District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black

061	41422	12668	30.58%	27.95%	61	45078	8601	19.1%	17.48%
062	55022	12961	23.56%	21.95%	62	45840	7250	15.8%	14.40%
063	59073	14172	23.99%	20.87%	63	45251	6146	13.6%	12.49%
064	40427	10471	25.90%	25.47%	64	45972	6679	14.5%	13.45%
065	38681	10439	26.99%	25.71%	65	45073	10851	24.1%	23.08%
066	40491	11154	27.55%	25.57%	66	45971	11666	25.4%	24.54%
067	37878	26188	39.14%	65.59%	67	45078	31189	69.2%	65.73%
068	36234	22646	62.50%	59.97%	68	45069	29109	64.6%	61.82%
069	37572	24087	64.11%	61.99%	69	45477	29188	64.2%	61.83%
070	39253	24295	61.89%	56.31%	70	45970	28607	62.2%	57.13%
071	38094	24485	64.28%	62.04%	71	45348	30334	66.9%	64.42%
072	39414	23696	60.12%	57.52%	72	45346	29265	64.5%	61.88%
073	48266	23431	48.55%	45.46%	73	45936	4819	10.5%	9.77%
074	41047	12539	30.55%	26.57%	74	45646	11280	24.7%	22.23%
075	60140	16759	27.87%	26.91%	75	45946	12224	26.6%	27.12%
076	44894	31229	69.56%	67.48%	76	45872	33962	73.9%	71.24%
077	34998	25753	73.58%	71.48%	77	45954	30812	67.0%	64.20%
078	30880	22955	74.34%	72.57%	78	45957	32246	70.2%	67.43%
079	52950	7588	14.33%	13.38%	79	45972	5450	11.9%	11.09%
080	54900	13051	23.77%	21.48%	80	45964	8084	17.6%	15.69%
081	43803	11588	26.45%	24.44%	81	45932	9214	20.1%	18.32%
082	43389	24808	57.18%	54.19%	82	45858	28504	62.2%	60.48%
083	41039	23404	57.03%	55.51%	83	45973	26523	57.7%	55.53%
084	41317	20934	50.67%	49.23%	84	45969	24068	52.4%	50.99%
085	42429	20523	48.37%	45.84%	85	45229	22847	50.5%	47.22%
086	49071	8357	17.03%	14.81%	86	45965	6347	13.8%	12.35%
087	46299	4317	9.32%	8.65%	87	45961	4252	9.3%	8.55%
088	56499	9520	16.85%	15.51%	88	45966	8536	18.6%	16.93%
089	44249	14490	32.75%	31.07%	89	45678	14732	32.3%	30.61%
090	39991	14302	35.76%	33.64%	90	45812	15994	34.9%	32.91%
091	49948	8523	17.06%	16.05%	91	45070	7243	16.1%	15.03%
092	40506	5434	13.42%	11.93%	92	45101	5892	13.1%	11.65%

	2002 Plan					Act 2012-602 Plan			
District	**Population**	**NH DOJ Black**	**% NH DOJ Black**	**% NH DOJ 18+ Black**	**District**	**Population**	**NH DOJ Black**	**% NH DOJ Black**	**% NH DOJ 18+ Black**
093	46741	8611	18.42%	16.24%	93	45956	8120	17.7%	15.66%
094	59763	4389	7.34%	6.68%	94	45965	3900	8.5%	7.52%

095	61642	3685	5.98%	4.92%	95	45971	2409	5.2%	4.24%
096	50198	6345	12.64%	11.62%	96	45970	4819	10.5%	10.06%
097	35406	21502	60.73%	57.35%	97	45071	27388	60.8%	56.73%
098	37831	24676	65.23%	62.38%	98	45069	27044	60.0%	57.96%
099	39791	29225	73.45%	70.09%	99	45069	29617	65.7%	62.07%
100	55488	7883	14.21%	12.78%	100	45069	6865	15.2%	13.64%
101	42749	10726	25.09%	22.28%	101	45089	7765	17.2%	15.76%
102	50860	6236	12.26%	11.62%	102	45071	3654	8.1%	7.53%
103	40611	28386	69.90%	64.83%	103	45075	29443	65.3%	60.18%
104	47450	7421	15.64%	13.97%	104	45072	7279	16.1%	13.98%
105	44279	4910	11.09%	9.82%	105	45072	4251	9.4%	8.61%
Total	**4,779,736**	**1,263,285**	**26.43%**	**24.85%**	**Total**	**4,779,736**	**1,263,285**	**26.43%**	**24.85%**
Total of 26 Majority BVAP Districts	**991,726**	**648,200**	**65.36%**	**62.40%**	**Total of 27 Majority BVAP Districts**	**1,224,702**	**790,924**	**64.58%**	**61.58%**
Total of 6 Influence Districts (31.07 to 49.23% BVAP)	**259,142**	**109,124**	**42.11%**	**39.52%**	**Total of 3 Influence Districts (30.61 to 47.22% BVAP)**	**136,719**	**53,573**	**39.18%**	**36.76%**
Difference in Black Pop in Majority Black Districts (2002 v. ACT 2012_602 Plan)				**-142,724**					
Difference in Black Pop in Influence Districts (2002 v. ACT 2012_602 Plan)				**55,551**					

APX 7

Redistricting Population Comparison
Alabama State Senate – 2002 Plan Compared to Act 2012-603 Plan (2010 Census)

2002 Plan					Act 2012-603 Plan				
District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black	District	Population	NH DOJ Black	% NH DOJ Black	% NH DOJ 18+ Black
001	135057	17971	13.31%	12.26%	1	136648	15504	11.35%	10.72%
002	179058	34672	19.36%	19.10%	2	137922	34063	24.70%	24.35%
003	151168	21148	13.99%	12.80%	3	137642	19445	14.13%	12.98%
004	123291	4975	4.04%	3.89%	4	135214	2595	1.92%	1.75%
005	134976	13569	10.05%	9.20%	5	135415	9066	6.69%	6.38%
006	117045	7234	6.18%	5.88%	6	136009	21129	15.54%	14.67%
007	148905	48386	32.49%	30.88%	7	137911	38169	27.68%	26.12%
008	142128	4540	3.19%	2.90%	8	137920	4960	3.60%	3.22%
009	144554	3219	2.23%	1.87%	9	137921	2460	1.78%	1.44%
010	125075	17247	13.79%	12.65%	10	137323	17399	12.67%	11.69%
011	125111	42844	34.24%	32.30%	11	136114	20828	15.30%	14.40%
012	142431	17755	12.47%	11.52%	12	135258	27686	20.47%	19.03%
013	132777	27437	20.66%	19.56%	13	137883	28967	21.01%	19.88%
014	168669	20687	12.26%	11.36%	14	136210	19533	14.34%	13.76%
015	160461	20844	12.99%	11.76%	15	136868	20108	14.69%	14.38%
016	149527	17230	11.52%	10.47%	16	137160	16465	12.00%	10.86%
017	157178	13224	8.41%	7.49%	17	135227	7525	5.56%	4.93%
017	112472	67410	59.93%	57.31%	18	135258	79971	59.12%	56.43%
019	109165	78214	71.65%	69.31%	19	135218	88419	65.39%	62.68%
020	107375	83713	77.96%	74.44%	20	135211	65699	63.38%	59.03%
021	140682	35581	25.29%	22.81%	21	135621	21337	15.73%	14.34%
022	137373	39126	28.48%	27.48%	22	137108	29821	21.75%	20.70%
023	111939	72521	64.79%	61.87%	23	135338	87706	64.81%	61.67%
024	118832	74662	62.82%	59.38%	24	137724	87175	63.30%	59.74%
025	157932	45466	28.79%	26.65%	25	135492	31191	23.02%	21.74%
026	120666	87785	72.75%	70.87%	26	136451	102641	75.22%	72.70%
027	139166	35474	25.49%	22.90%	27	137918	29517	21.40%	19.50%

2002 Plan					Act 2012-603 Plan				
District	**Population**	**NH DOJ Black**	**% NH DOJ Black**	**% NH DOJ 18+ Black**	**District**	**Population**	**NH DOJ Black**	**% NH DOJ Black**	**% NH DOJ 18+ Black**
028	131368	67061	51.05%	49.82%	28	137909	82686	59.96%	58.03%
029	136679	21062	15.41%	13.65%	29	137921	21329	15.46%	13.81%
030	139399	40991	29.41%	28.15%	30	135374	30070	22.21%	21.33%
031	129622	31542	24.33%	22.44%	31	137917	27190	19.71%	18.45%
032	155619	9815	6.31%	5.47%	32	137918	11209	8.13%	7.35%
033	111915	72622	64.89%	61.55%	33	136214	97679	71.71%	68.10%
034	155435	20794	13.38%	12.20%	34	135267	17435	12.89%	11.68%
035	126686	46474	36.68%	32.67%	35	135232	26308	19.45%	17.27%
Total	**4,779,736**	**1,263,285**	**26.43%**	**24.85%**		**4,779,736**	**1,263,285**	**26.43%**	**24.85%**
Total of 7 Majority BVAP Districts	**792,364**	**536,917**	**67.76%**	**64.77%**	**Total of 8 Majority BVAP Districts**	**1,089,323**	**711,976**	**65.36%**	**62.21%**
Total of 4 Influence Districts (30.88% to 49.8% BVAP)	**532,070**	**204,765**	**38.48%**	**36.36%**	**Zero Influence Districts**	**0**	**0**	**0.0%**	**0.0%**
Difference in Black Pop in Majority Black Districts (2002 v. ACT 2012_603 Plan)				**-175,059**					
Difference in Black Pop in Influence Districts (2002 v. ACT 2012_603 Plan)				**204,765**					

DECLARATION OF RANDY HINAMAN

1. My name is Randy Hinaman. I am over the age of 21 years, have personal knowledge of the facts set forth, and am competent to testify regarding them.

* * *

4. In drawing the lines for all the new districts, I used information conveyed to me by Senator Dial, Representative McClendon, and individual legislators to try to make sure we accommodated the legislators' wishes to the extent possible. I did make recommendations, including the recommendations to move HD 53 from Birmingham to Huntsville and to make HD 85 a majority-black district thereby increasing the total number of black-majority districts under the House plan to 28, but the decision to follow those recommendations was made by Representative McClendon, not by me.

5. Senator Dial gave me a map of the Birmingham-area black majority Senate districts (SDs 18, 19, and 20) that I understood came from Senator Rodger Smitherman. That map did not include any demographic information with it, but when I looked at the neighborhoods included in the new district boundaries, I saw that the black population in the proposed new districts was about the same percentage as in the old districts. That map also split a number of precincts, which I input into the draft Senate plan as they came to me. I estimate that I used 90-95% of that map in drawing the lines for the Senate plan, with the changes coming around the edges of the

districts. The decision to follow these recommendations was made by Senator Dial.

* * *

10. As I have previously noted, that black-majority districts in the Alabama Senate plan were each under-populated coming into the 2012 redistricting effort. This was particularly true of SDs 23 and 24, which are located in the rural west-central part of the State south of Tuscaloosa and north of Mobile. SD 24 borders on Mississippi. SD 23 was 24,625 people (-18.03%) short of an ideal Senate district, and SD 24 was 17,732 (-12.98%) short. Both districts needed to add population and to remain reliable black majority districts, and the best place to get the additional population was by pushing south into SD 22 and east into SD 30. That would cause less disruption to other districts than pushing north and east toward Tuscaloosa. This also kept the African-American percentages nearly identical to what they had been. Pushing south had the additional benefit of putting the extra 19,000 people in SD 32 in Baldwin County into a district that met the allowable population deviation. As a result, the changes I proposed included pushing SD 22 further into Baldwin County. Senator Dial made the decision on how to fit these districts into the Senate plan, not me.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, BOBBY SINGLETON, ALABAMA ASSOCIATION OF BLACK COUNTY OFFICIALS, RED ARMSTEAD, GEORGE BOWMAN, RHONDEL RHONE, ALBERT P. TURNER, JR., AND JOLES WILLIAMS, JR. INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED	)	
Plaintiffs,	)	
v.	)	Civil Action No.
THE STATE OF ALABAMA; BETH CHAPMAN, IN HER OFFICIAL CAPACITY AS ALABAMA SECRETARY OF STATE,	)	2:12-CV-491-WKW-MHT-WHP (3 Judge Court)
Defendants,	)	
DEMETRIUS NEWTON, et al.,	)	
Plaintiffs,	)	Civil Action No.
v.	)	2:12-CV-1081-WKW-MHT-WHP
THE STATE OF ALABAMA, ET AL.	)	

DEPOSITION OF MR. HINAMAN

Q. Okay. Item 3 on PX-6 is goals for each plan. What goals were discussed?

A. That was primarily one of my questions was are we putting members together? Are we making sure we do not put incumbent members of the legislature together? Are there any other goals related to the map?

Q. And the responses you got were?

A. My response I got are please do not – our goal is to not put any members together if possible. Obviously that may not be possible in all cases. As it turned out, it was possible in the Senate map but not in the House.

(Hinaman Dep. 25:3-15)

* * *

Q. Did you go over the guidelines that the Reapportionment Committee had voted for?

A. We did. We talked about those, yes.

Q. And were you given a copy of those?

A. Yes, sir. If I may just add one other thing to your earlier question on the goals? It was also a goal to change each district to some extent the least amount possible but still obviously live within the guidelines of the Reapportionment Committee and the deviation. So, in other words, if Senate District X had these four counties, you know, try to keep it as

close to these four counties as possible, which obviously isn't always possible.

(Hinaman Dep. 25:16 – 26:3)

* * *

Q. But you said that the requirement that contests between incumbent members of Congress, the legislature and the state board will be avoided whenever possible, that was discussed?

A. Yes, sir.

(Hinaman Dep. 29:16-20)

* * *

Q. Paragraph 5, every ESI, which is electronically stored information I think is what it stands for, or database reflecting demographic information as far as voting patterns and so forth. That's what you provided on the thumb drive?

A. Yes, it's part of what's on the thumb drive. Yes, sir.

Q. Are there any other databases that you haven't told me about either that were provided by Maptitude or that you got from the Reapportionment Office or the RNC that you used?

A. No. the only exception to that, which you haven't gotten to that piece of paper, but that's a list of Senators and their addresses.

I also had a list of House members and their addresses, but for some reason I couldn't find it in my computer. But I was given a list of House members and their addresses if you count that as data.

Q. Well, you did have to locate the residences of incumbents on the map at some point, didn't you?

A. Yes, sir.

Q. And you used a GPS function to do that?

A. I was provided that by the Reapportionment Committee. Yes.

(Hinaman Dep. 36:1-24)

* * *

Q. Would it have been possible to put Senator Irons and Senator Bedford in the same district?

A. It would have been and I actually discussed that as a possibility, but both Senator Dial and Pro Tem Marsh told me that they did not want to put two senators in the same district.

(Hinaman Dep. 143:21 – 144:1)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE
BLACK CAUCUS, et al.,

Plaintiffs,

vs.

THE STATE OF ALABAMA,
et al.,

Defendants.

CIVIL ACTION NO.
2:12-CV-0069-
WKW-MHT-WHP

* * * * * * * * * * *

DEMETRIUS NEWTON,
et al.,

Plaintiffs,

v.

THE STATE OF ALABAMA,
et al.

Defendants.

CIVIL ACTION NO.
2:12-CV-0069-
WKW-MHT-WHP

* * * * * * * * * * *

DEPOSITION OF THEODORE S. ARRINGTON
JUNE 28, 2013

* * * * * * * * * * *

THEODORE S. ARRINGTON

The witness, after having first been duly sworn to speak the truth, the whole truth and nothing but the truth testified as follows:

* * *

Q. Can you explain the evidence that supports your conclusion that the legislature acted with discriminatory intent in adopting the 2012 legislative plans?

* * *

A. Now, remember. I don't by any means say that they were the exclusive motive. Obviously partisanship is always the major motive when you're redrawing districts – when legislators are drawing districts. Not when I draw districts or necessarily when courts do. But when legislators draw districts, we all know that partisanship is the most important factor. But in Alabama, partisanship and race are inextricably combined. They can't be separated in a convenient way.

So by acting to prevent the election of white Democrats, even though you're protecting black districts, when you act to prevent the election of white Democrats, you're essentially cutting off the blacks from the ability to form alliances with whites, putting them in a political ghetto, and that's racial discrimination. And that was part and parcel of the intent of the legislature by their own words.

Q. When you talk about the statements of legislators/ you were talking about Senator Beason and Representative Lewis; is that right?

A. I also think comments that have been made/for example/to the media and – that the intent was to eliminate all of the white Democratic districts.

(Arrington Dep. 20:4-7; 21:6-22:10)

Q. Should the Republicans step in between him and himself?

A. Yeah/they should. But they are not going to. I'm not – I'm not naive. I've been involved in politics since 1960. They are not going to do that.

(Arrington Dep. 48:13-49:18)

Q. What do you point out with respect to the process of overall design?

A. The overall design of the plan was in the hands of Mr. Hinaman, and whatever instructions he received from the cochairs, from the president pro temp, and from the lieutenant governor and what he assumed from the nature of the 501C4 who is paying his bills, from the fact that he said specifically that he would only work with Republican legislators and that the cochairs have said specifically that his job was to work with the Republican caucus, period.

So the overall design of the plan comes basically from Mr. Hinaman based on what we know of the partisan nature of his instructions.

Q. And that's partisan. Right? Correct?

A. Yes. Keeping in mind that race and party cannot be disentangled in Alabama. Can't be disentangled anywhere, but it's particularly difficult to disentangle it in the deep South.

Q. How do we know if it's race or politics?

A. Because it is the same. The major way that you know how a precinct has voted in most of Alabama is the percentage of blacks in that precinct. And that will tell you – I'll give you a correlation: Higher than 8, probably higher than 9, but certainly higher than 8 between the percentage black in a precinct and the vote for Democrats in that precinct.

Now, there are some parts of Alabama where there are still substantial numbers of white Democrats. But in most of Alabama, you're down in the 30 percent or so of whites that are voting for the Democrats.

(Arrington Dep. 65:2-66:12)

Q. Okay.

A. Blacks vote overwhelmingly 90 percent or more for Democrats, and everybody in Alabama knows that.

(Arrington Dep. 149:2-5)

TESTIMONY ON RACIALLY POLARIZED VOTING IN ALABAMA AND ITS IMPLICATIONS FOR AFRICAN AMERICAN VOTER OPPORTUNITIES IN REDISTRICTING PLANS

Allan J. Lichtman
Distinguished Professor of History
American University
Washington, DC 20016

July 30, 2013

Pursuant to 28 U.S.C. § 746, I declare under penalty of perjury that the information set forth in this report is true and correct to the best of my knowledge and belief.

/s/ Allan J. Lichtman
Allan J. Lichtman

I. Qualifications

1. My name is Allan J. Lichtman. My current position is Distinguished Professor of History at American University in Washington, D.C., where I have been employed for 40 years. Formerly, I served as Chair of the History Department and Associate Dean of the College of Arts and Sciences at American University. I received my BA in History from Brandeis University in 1967 and my Ph.D. in History from Harvard University in 1973, with a specialty in the mathematical analysis of historical data. My areas of expertise include political history, electoral analysis, and historical and quantitative methodology.

2. I am the author of numerous scholarly works on quantitative methodology in social science. This scholarship includes articles in such academic journals as *Political Methodology*, *Journal of Interdisciplinary History*, *International Journal of Forecasting*, and *Social Science History*. In addition, I have coauthored *Ecological Inference* with Dr. Laura Langbein, a standard text on the analysis of social science data, including political information. I have published articles on the application of social science analysis to civil rights issues. This work includes articles in such journals as *Journal of Law and Politics*, *La Raza Law Journal*, *Evaluation Review*, *Journal of Legal Studies*, and *National Law Journal*. My scholarship also includes the use of quantitative and qualitative techniques to conduct contemporary and historical studies, published in such academic journals as *The Proceedings of the National Academy of Sciences*, *The American Historical Review*, *Forecast*, and *The Journal of Social History*. Quantitative and historical analyses also ground my books, *Prejudice and the Old Politics: The Presidential Election of 1928*, *The Thirteen Keys to the Presidency* (co-authored with Ken DeCell), *The Keys to the White House*, and *White Protestant Nation: The Rise of the American Conservative Movement*.

3. My book, *White Protestant Nation*, was one of five finalists for the National Book Critics Circle Award for the best general nonfiction book published in America. My most recent book, co-authored with Richard Breitman, *FDR and the Jews*, was published

under the Belknap Imprint of the Harvard University Press, reserved for works of special significance and lasting impact. This book was an editor's choice book of the *New York Times* in 2013 and has been submitted for the Pulitzer Prize.

4. I have worked as a consultant or expert witness for both plaintiffs and defendants in more than eighty voting and civil rights cases. These include several cases in the state of Alabama and in many other southern states. In the U. S. Supreme Court case, *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), the majority opinion written by Justice Kennedy authoritatively cited my statistical work several times. My work includes more than a dozen cases for the United States Department of Justice and cases for many civil rights organizations. I have also worked as a consultant or expert witness numerous times in defending enacted plans from voting rights challenges.

II. Statement of Inquiry

5. I have been asked to examine the voting behavior of African Americans and whites in recent elections held in the state of Alabama. I have been asked to consider whether such voting is polarized along racial lines, with African Americans cohesive behind candidates of their choice and white voters bloc voting against these candidates. I have also been asked to consider the implications of polarized voting and turnout for African American voter opportunities

in alternative illustrative districts for the State House and State Senate. I have attached a CV and a table of cases with this testimony.

III. Summary of Opinions

6. I found that (1) voting is highly polarized along racial lines in recent general elections held in the state of Alabama, with African Americans nearly unanimous in their choice of candidates and whites strongly voting against those African American candidates of choice. I found that (2) African Americans invariably prefer Democratic candidates in general elections and that whites invariably prefer Republican candidates. Thus, party loyalty, which is tied to race, pulls African Americans and whites in different directions. I also found that (3) polarization between African Americans and whites in general elections is greater when the Democratic candidate is African American rather than white. Thus, the direct effect of an African American candidacy creates more racial polarization than would be accounted for by party alone. In addition, I found that (4) these patterns of racially polarized voting indicate that the African American voters would not have reasonable opportunities to elect candidates of their choice to office in districts dominated by whites. In such districts white bloc voting would prevail. Finally, I found that (5) these patterns of polarized voting combined with turnout for African Americans and whites further indicate that African Americans would have an excellent opportunity to elect candidates of their

choice in the plaintiffs' illustrative additional majority-minority districts.

IV. Data and Methods

7. The voting analysis in this report relies on standard data utilized in social science: county-level or precinct by precinct-level election returns for relevant elections, with candidates identified by race and voters categorized as either African Americans or whites. The category white will include some Latinos and others. These ethnic and racial groups comprise a small percentage of Alabama's registered voters and are not concentrated in a sufficient number of precincts for statistical analysis of their voting choices. Data was obtained from counsel and from the website of the Alabama Secretary of State. My understanding is that counsel obtained their information from the state and localities. The analysis utilizes the standard methodology of ecological regression that I have employed in some 80 previous voting rights cases. This procedure was recognized by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and applied by the Court to single-member districts plans in *Quilter v. Voinovich*, 113 S.Ct 1149 (1993). My analysis based on these methods was cited in the recent *LULAC* Supreme Court case. It was also cited by the three judge court in the 2011 Illinois Congressional litigation: *Committee for a Fair and Balanced Map, et al. v. Illinois State Board of Elections, et al.* 835 F. Supp. 2d 563 – Dist. Court, ND Illinois 2011.

V. Results of Analysis: Elections Held Statewide

8. Table 1 reports the results of an analysis that examines recent elections held statewide in Alabama. Given the difficulty of matching precinct level registration statistics and election returns for the entire state, this analysis uses counties as the basis for statistical study.[1] There are a sufficient number of counties in Alabama (67) and a sufficient range in the percentage of African American registrants (from less than 1 percent to 85 percent) for reliable analysis. The results reported in Table 1 show that African American voters overwhelmingly backed the Democratic candidate in all six statewide elections studied, from 2004 to 2012. In turn, the results in Table 1 demonstrate that whites overwhelmingly bloc voted against the African American candidates of choice. As indicated in the final row of Table 1 black cohesion behind the Democratic candidate averaged 93 percent for all elections, whereas white support for these candidates averaged 24 percent for all elections. Thus, there is a high degree of polarization between the candidate choices of African Americans and whites in the six elections, equal to 69 percentage points (93% minus 24%).

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[1] The registration and election data is often compiled with different precinct designations.

Table 1
Ecological Regression Results for Six General Elections Held Statewide (* Indicates Winner)

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2008 US Senate		
Figures (BD)	93%	19%
Sessions (WR) *	7%	81%
2008 President		
Obama (BD)	98%	20%
McCain (WR) *	2%	80%
2012 President		
Obama (BD)	91%	17%
Romney (WR) *	9%	83%
Mean Vote for Black Democrat	**94%**	**19%**
White Versus White Elections		
2004 President		
Kerry (WD)	91%	22%
Bush (WR) *	9%	77%
2008 Justice 1		
Paseur (WD)	90%	37%
Shaw (WR) *	10%	63%

2012 Chief Just		
Vance (WD)	95%	29%
Moore (WR) *	9%	71%
Mean Vote for White Democrats	**92%**	**29%**
Mean Vote for All Democrats	**93%**	**24%**

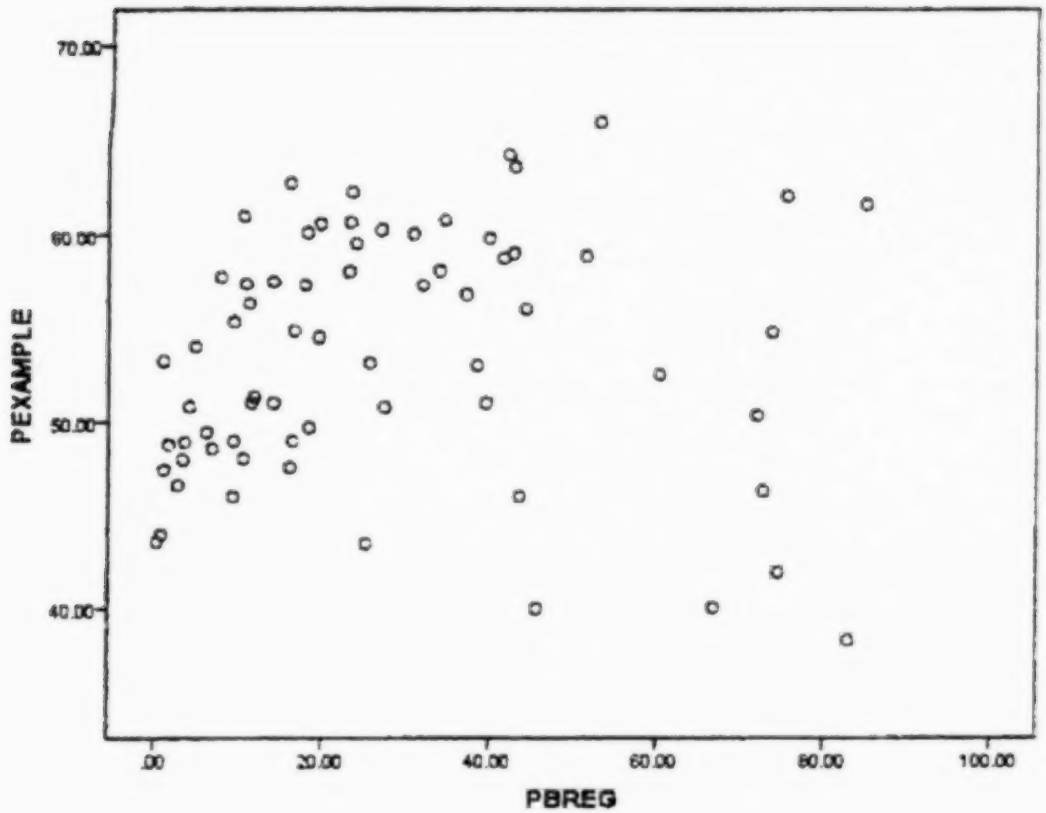
9. Table 1 also demonstrates that polarized voting exists in these general elections independent of party. That is, polarized voting is substantially stronger for elections with black Democrats than for elections with white Democrats. Black cohesion is only slightly lower for white versus white than black versus white elections (94 percent compared to 92 percent). However, white bloc voting against the African American candidate of choice is much more substantial in the black versus white than in the white versus white elections. As indicated in Table 1, only 19 percent of white voters backed black Democrats, whereas 29 percent of white voters backed white Democrats. The degree of polarization in black versus white elections is especially high at 75 percentage points (94% minus 19%), compared to 63 percentage points in white versus white elections (92% minus 29%).

10. Although there is a separate racial component in these results, the influence of party loyalty in the South is intimately tied to race. Democratic President Lyndon Johnson's backing for the Civil Rights

Act of 1964 and the Voting Rights Act of 1965 cemented the loyalties of African Americans to the Democratic Party and pushed white southerners towards the Republicans. The shift of white southern voters in the latter part of the 20th century from the most reliable of Democrats to the most loyal of Republicans is one of the most dramatic political transformations in U. S. history.

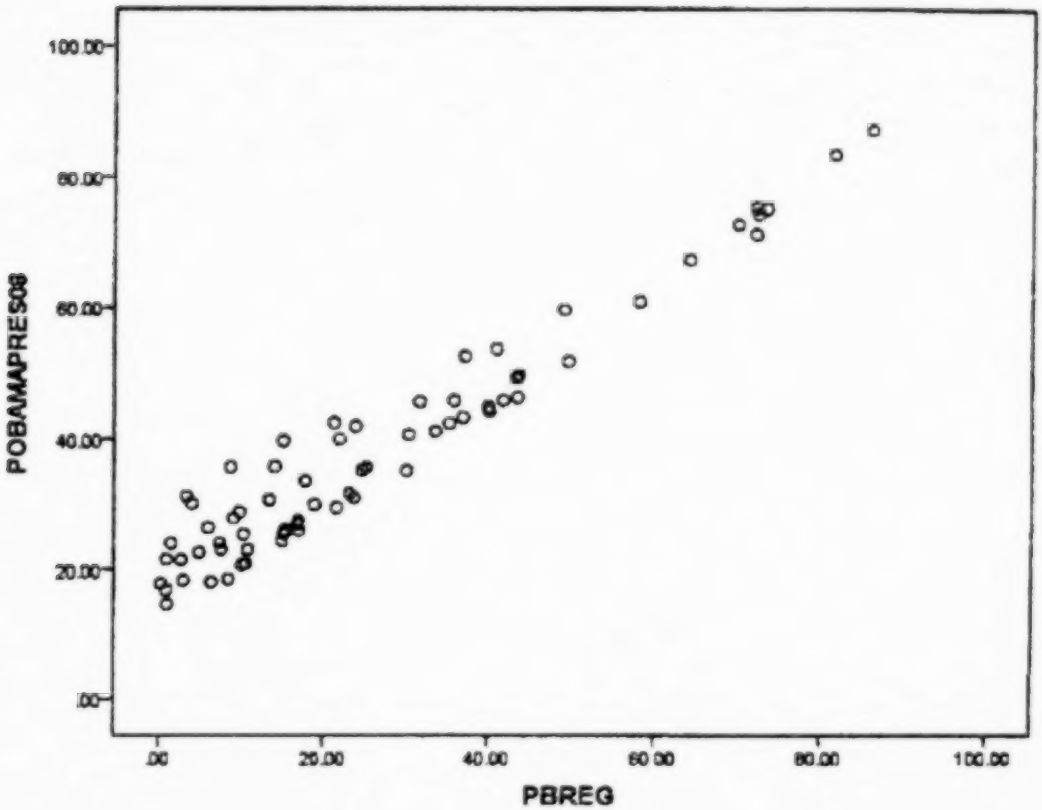
11. The reliability of the ecologically regression results is sustained by Charts 1 to 6 in Appendix I that portray for each of the six statewide elections the relationship between the percentage of African American registrants in a county and the percentage of the two-party vote for the Democratic candidate. In these "scattergrams" the X axis represents the percentage of African American registrants in each of the state's counties and the Y axis the percentage of the two-party vote for the Democratic candidate. Each point on the scattergram represents the intersection of each precincts percentage of African Americans and its percentage of the two-party Democratic vote. Chart 7 of Appendix I displays an example of a relationship where there is a lack of polarization between African Americans and whites.

Chart 7: Sample Chart Showing a Lack of Polarization Between African American and White Registrants in Each County



The chart shows no tight linear relationship, but rather a diffuse cloud of counties. In contrast, charts 1 to 6 portray a very tight upward sweeping linear relationship between the racial composition of the counties and the distribution of the vote in the counties, as in Chart 2, which reflects the vote for and against Obama in the 2008 presidential election.

Chart 2: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2008 Presidential General



As the African American composition of a county increases, so does its vote for the Democratic candidate in each of six election. This close relationship displayed in Charts 1 to 6 is very rarely found in social science. It should also be noted that as compared to African American Democrats, the charts for white Democrats are pitched higher on the Y axis and slowly a slightly less tight relationship between race and the vote emerges. This reflects the greater white vote for white Democratic candidates, compared to black Democratic candidates.

12. Charts 1 to 6 also demonstrate that counties are remarkably consistent in voting patterns. There is no indication in these charts of substantial differences in various parts of the state in polarized voting between African Americans and whites. That is, there are no groups of counties that stand out as markedly different from the overall relationships between race and voting displayed in the charts across the state. Rather counties are tightly clustered in a linear pattern for a variety of elections across three election cycles. The results are especially consistent across counties for the three elections with African American candidates.

13. The ecological regression results are additionally confirmed by the scrutiny of exit polls. These polls are based on a methodology that is strictly independent of ecological regression. Exit polls involve no analysis of election returns; they are based on responses to questions presented to voters upon leaving the polls on Election Day. As indicated in Table 2, exit polls for Alabama are available for three black vs. white and one white versus white of the six statewide elections studied. These results show nearly the same pattern of polarized voting as the ecological regression results. In fact, the exit polls show a higher level of polarization than the ecological regression results for each of the four elections included in both Table 1 and Table 2. The exit poll results reported in Table 2 also confirm that polarization in greater in elections with black Democrat as compared to elections with white Democrats – 83 percentage points (95% minus 12%) versus 74 percentage points (93% minus 19%).

VI. Results of Analysis: Statewide Elections in Key Counties

14. Tables 3 to 5 report the results of an analysis that examines recent statewide elections within the three individual counties for which illustrative additional districts are presented: Jefferson, Madison, and Montgomery counties. I have been able to match most precinct level registration and election results for all contests presented above from 2008 and 2012. The results reported in Tables 3 to 5 show patterns of racial polarization quite similar to those found for the statewide county by county analysis. In each election in each county, African American voters unite in virtual unanimity behind their candidates of choice, whereas a substantial majority of white voters vote against these candidates.

Table 2
Exit Poll Results for Four General Elections Held Statewide (* Indicates Winner)

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2008 US Senate		
Figures (BD)	92%	11%
Sessions (WR) *	8%	89%
2008 President		
Obama (BD)	98%	10%
McCain (WR) *	2%	90%

2012 President		
Obama (BD)	95%	15%
Romney (WR) *	5%	85%
Mean Vote for Black Democrat	**95%**	**12%**
White Versus White Election		
2004 President		
Kerry (WD)	**93%**	**19%**
Bush (WR) *	7%	81%
Mean Vote for All Democrats	**95%**	**14%**
Source: CNN.com. Results reflect only two-party totals.		

15. Again, white bloc voting against the candidates of choice of black voters is strongest in elections with black candidates. In Jefferson County, Table 3 demonstrates that a mean of 19 percent of white voters backed the black candidate of choice of black voters for a polarization rate of 81 percent. A mean of 33 percent of white voters backed the white candidate of choice of black voters in Jefferson County, for a polarization rate of 67 percent. For all five elections in Jefferson County, a mean of 25 percent of white voters backed the candidate of choice of black voters, for a polarization rate of 75 percent.

16. In Madison County, Table 4 demonstrates that a mean of 24 percent of white voters backed the black candidate of choice of black voters for a

polarization rate of 76 percent. A mean of 36 percent of white voters backed the white candidate of choice of black voters in Madison County, for a polarization rate of 64 percent. For all five elections in Madison County, a mean of 29 percent of white voters backed the candidate of choice of black voters, for a polarization rate of 71 percent.

17. In Montgomery County, Table 5 demonstrates that a mean of 20 percent of white voters backed the black candidate of choice of black voters for a polarization rate of 80 percent. A mean of 41 percent of white voters backed the white candidate of choice of black voters in Montgomery County, for a polarization rate of 59 percent. For all five elections in Montgomery County, a mean of 28 percent of white voters backed the candidate of choice of black voters, for a polarization rate of 72 percent.

Table 3
Ecological Regression Results Within Jefferson County for Five General Elections Held Statewide

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2008 US Senate		
Figures (BD)	100%	17%
Sessions (WR) *	0%	83%

2008 President		
Obama (BD)	100%	21%
McCain (WR) *	0%	80%
2012 President		
Obama (BD)	100%	20%
Romney (WR) *	0%	83%
Mean Vote for Black Democrat	**100%**	**19%**
White Versus White Elections		
2008 Justice 1		
Paseur (WD)	100%	28%
Shaw (WR) *	0%	72%
2012 Chief Just		
Vance (WD)	100%	38%
Moore (WR) *	0%	62%
Mean Vote for White Democrats	**100%**	**33%**
Mean Vote for All Democrats	**100%**	**25%**

Table 4
Ecological Regression Results Within Madison County for Five General Elections Held Statewide

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2008 US Senate		
Figures (BD)	100%	19%
Sessions (WR) *	0%	81%
2008 President		
Obama (BD)	100%	27%
McCain (WR) *	0%	83%
2012 President		
Obama (BD)	100%	26%
Romney (WR) *	0%	84%
Mean Vote for Black Democrat	**100%**	**24%**
White Versus White Elections		
2008 Justice 1		
Paseur (WD)	100%	39%
Shaw (WR) *	0%	61%
2012 Chief Just		
Vane (WD)	100%	33%
Moore (WR) *	0%	67%
Mean Vote for White Democrats	**100%**	**36%**
Mean Vote for All Democrats	**100%**	**29%**

Table 5
Ecological Regression Results Within Montgomery County for Five General Elections Held Statewide

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2008 US Senate		
Figures (BD)	100%	17%
Sessions (WR) *	0%	81%
2008 President		
Obama (BD)	100%	22%
McCain (WR) *	0%	83%
2012 President		
Obama (BD)	100%	20%
Romney (WR) *	0%	84%
Mean Vote for Black Democrat	**100%**	**20%**
White Versus White Elections		
2008 Justice 1		
Paseur (WD)	100%	41%
Shaw (WR) *	0%	59%
2012 Chief Just		
Vane (WD)	100%	41%
Moore (WR) *	0%	59%
Mean Vote for White Democrats	**100%**	**41%**
Mean Vote for All Democrats	**100%**	**28%**

18. The reliability of the ecologically regression results is sustained by Charts included in Appendices 2 to 4, that portray the relationship between the percentage of African American registrants within individual precincts and the percentage of the two-party vote for the Democratic candidate for each of the five elections and three counties. These charts demonstrate across five elections and three counties that even for units as small as precincts there is a very tight linear relationship between the racial composition of the precincts and the distribution of the vote in the precincts. The only substantial exception occurs for a few heavily white precincts in Jefferson County that provided a majority of their votes for the candidate of choice of black voters.

19. The estimates in Tables 3 to 5 of one hundred percent black cohesion does not mean that not a single voter diverged from the pattern shown. Estimates of zero and one hundred do sometimes occur at the far extremes in ecological regression analysis and indicate extremely high cohesion or bloc voting. A cohesion finding of 100 percent or very close to 100 percent is confirmed by the precinct-level charts in Appendices 2 to 4, which show that as the black registration percentage in a precinct approaches 100 percent, the vote for the candidate of choice of black voters likewise approaches 100 percent. Similar results emerged for some contests in the 2003 analyses in *LULAC v. Perry* and in the 2011 analyses in *Committee for a Fair and Balanced Map, et al. v. Illinois State Board of Elections, et al.*

VII. Results of Analysis: State House and Senate Elections

20. Table 6 reports the results of ecological regression analysis for elections held within State House and State Senate elections in areas of interest within Alabama.[2] These results are similar to those found for elections held statewide, showing both overwhelming African American cohesion behind candidates of their choice and substantial white bloc voting against these candidates. As indicated in the final row of Table 6 black cohesion behind the Democratic candidate averaged 94 percent for all elections, whereas white support for these candidates averaged 27 percent for all elections. Thus, the degree of polarized voting in the six elections is 67 percentage points (94% minus 27%), very close to the 69 percentage points found for the six elections held statewide. Once again, white bloc voting against the African American candidate of choice is much more substantial in the black versus white than in the white versus white elections. As indicated in Table 6, only 15 percent of white voters backed African American Democrats, whereas 34 percent of white voters backed the white Democrat. The degree of polarization in black versus white elections is 82 percentage points (97% minus 15%),

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[2] For districts with multiple counties it was not possible always to match election returns with regression data. In no case, however, was more than a single county not included. Also, there are additional elections for which matching information was not available.

compared to 58 percentage points in white versus white elections (92% minus 34%).

VIII. Results of Analysis: Native American and Hispanic Voting

21. There is an insufficient concentration of Native Americans or Hispanics in the state of Alabama for ecological regression analysis. However, there is evidence pointing to the cohesion of these two groups with the choices of African Americans in general elections. With respect to Native American voting some indication of preferences is provided by the McIntosh High School precinct in Senate District 22, Washington County. This precinct has a Native American plurality with 41 percent of registered voters. African Americans comprise another 23 percent of registrants for a combined Native American African American majority of 64 percent. In the 2006 general election for State Senate this precinct cast 75 percent of its vote for the Democrat Lindsay and in the 2010 general election for State Senate it cast 87 percent of its vote for the Democrat Keahey. These results point to a voting coalition of Native Americans and African Americans given that about 60 percent of white voters overall backed the Republican candidates in these two elections.

Table 6
Ecological Regression Results for General Elections in State House & Senate Districts (* Indicates Winner)

Elections and Candidates	% African American Voters for Candidate	% of White Voters for Candidate
Black Versus White Elections		
2009 Senate D9		
Hall (BD)	100%	17%
Sanford (WR) *	0%	83%
2010 House D84		
Forte (BD) *	90%	0%
Perrin (WR)	10%	100%
2010 House D85		
Grimsley (BD) *	100%	29%
Singleton (WR)	0%	71%
Mean Vote for Black Democrat	**97%**	**15%**
White Versus White Elections		
2006 Senate D22		
Lindsey (WD) *	79%	41%
McMillan (WR)	21%	59%
2010 Senate D7		
Enfinger (WD)	88%	24%
Sanford (WR) *	12%	76%

2010 Senate D11		
Fielding (WD) *	100%	34%
Robbins (WR)	0%	66%
2010 Senate D22		
Keahey (WD) *	91%	40%
Joyner (WR)	9%	60%
2010 House D73		
Hubbard (WD) *	100%	30%
Grimes (WR)	0%	70%
Mean Vote for White Democrats	**92%**	**34%**
Mean Vote for All Democrats	**94%**	**27%**

22. With respect to Hispanics, there are no precincts comparable to McIntosh High School for Indians. However, it is well established that with the exception of Cuban-Americans, Hispanics are overwhelmingly Democratic in their choice of candidates. (see, Mark Hugo Lopez and Paul Taylor, *Latino Voters in the 2012 Election*, Pew Research Hispanic Center, November 12, 2012 (http://www.pewhispanic.org/2012/11/07/latino-voters-in-the-2012-election/). Recent Census data indicates that the Hispanic population of Alabama is almost entirely non-Cuban. The Census reports country of origin among foreign born Hispanics. In Alabama, the percentage with origins in Cuba is an inconsequential 1.4 percent. (Table B05006, *Place of Birth for the Foreign-Born Population*, 2007-2011, American Community Survey, Three Year

Estimates). Given that these foreign born would also comprise most parents of native born Hispanics, the overall Hispanic population should closely reflect the minimal percentage reported above.

IX. Results of Analysis: African American Voter Opportunities

23. The consideration of African American and white turnout in Alabama provides additional perspective on these polarized voting results. Today African American participation in elections in Alabama is at least comparable and likely above white participation. According to statistics compiled by the Alabama Secretary of State, African Americans now comprise some 26.9 percent of active registered voters in the state. This is higher than the African American percentage of the voting age population, which is 25.2 percent. For the most recent elections, held in 2012, the percentage of African Americans among voters was higher yet at 28 percent according to exit poll data. Estimation of the percentage of African American voters in 2012 based on ecological regression yields slightly higher results at some 30 percent. However, as indicated below, African American voter opportunities in districts that are above 46 percent African American voting age population are by no means dependent on equal or higher African American turnout, given the extremely high cohesion of this voter group.

24. These polarized voting and turnout results demonstrate that African Americans in Alabama would find their opportunities to elect candidates of their choice and participate fully in the political process impeded in state legislative districts dominated by whites. However, the very high degree of black cohesion combined with white crossover demonstrates that it is not necessary to draw super-majority African American districts to provide African Americans a reasonable opportunity to elect candidates of their choice to the state legislature.

25. Analysis demonstrates that all three of the illustrative alternative districts attached to this report would provide African American voters an excellent opportunity to elect candidates of their choice. Table 7 presents the demography of the three districts and Table 8 presents projections of the vote for African American candidates of choice based on county-specific turnout rates and the levels of black cohesion and white crossover voting presented in Tables 3-5. The results reported in Table 8 show that the candidate of choice of African American voters would be a clear winner, even if the analysis is only limited to elections with black candidates. These analyses focus on general elections. With respect to primary elections, African Americans are overwhelmingly Democratic and whites overwhelmingly Republican. African Americans in such districts would thus constitute the great majority of primary voters and be able to nominate their candidate of choice (a candidate of choice of African American voters could be of any race).

26. These findings are sustained by the actual results of elections in Alabama. There are three districts in the current State House plan that are equal to or greater than 40 percent African American in their voting age population, but less than 50 percent. The African American voting age populations in these districts range from 46 percent to 49.7 percent, close to the percentages for the illustrative districts. As indicated in Table 9, Democrats won all three districts and African American candidates prevailed in two of the three districts in 2010, a bad year for Democrats in Alabama and across the nation. These findings regarding opportunities for African American voters in below 50 percent but above 40 percent African American VAP are comparable to my recent findings for other states, including North Carolina and Illinois.[3]

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[3] See declaration of Allan Lichtman in *North Carolina Branches of the NAACP et al. v. State of North Carolina, et al.* Civil Action No: 11-CV-01640, in the North Carolina General Court of Justice, County of Wake, Superior Court Division and Lichtman, Testimony Before the Senate and House Redistricting Committees, Illinois, May 24, 2011, http://www.ilhousedems.com/redistricting/?page_id=417.

Table 7
Demographic Analysis of Illustrative Alternative State Legislative Districts

District	% Minority	% Black	% Black Voting Age
Jefferson Co. House	63.7%	55.7%	53.0%
Montgomery Co. House	55.6%	50.4%	46.6%
Madison Co. Senate	58.0%	48.4%	46.5%

Table 8
Projected Votes for Candidate of Choice of Black Voters, Illustrative Alternative Districts

District	Black Vote for Preferred Candidate of Black Voters	White Vote for Preferred Candidate of Black Voters	Total Vote for Preferred Candidate of Black Voters
Jefferson Co. House	52%	13%	**65%**

Montgomery Co. House	40%	17%	57%
Madison Co. Senate	43%	16%	59%
District	Black Vote for Preferred Candidate of Black Voters	White Vote for Preferred Candidate of Black Voters	Total Vote for Preferred Candidate of Black Voters
Jefferson Co. House	52%	10%	62%
Montgomery Co. House	40%	14%	54%
Madison Co. Senate	43%	11%	54%

27. Plaintiffs in this case have presented illustrative partial plans showing that it is possible to create additional African American opportunity districts in both the House and the Senate (see also, Report of Bill Cooper submitted for this litigation). Those illustrations, which are the basis of the projections above, are attached as Appendix VI of this report.

Table 9
Election Results in State Legislative Districts Below 50% African American VAP and Above 40% African American VAP, 2010 General Election

Current House District	African American VAP % 2010 Census	Winning Candidate in 2010	
HD 73	46.0%	Hubbard (WD)	
HD 84	49.7%	Forte (BD)	
HD 85	46.1%	Grimsley (BD)	

Appendix I: Charts Showing Relationship Between Percentage of African American Registrants in Counties and the Percentage of the Vote for Candidate of Choice of African American Voters as Demonstrated In Table 1

Chart 1: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Kerry, 2004 Presidential General

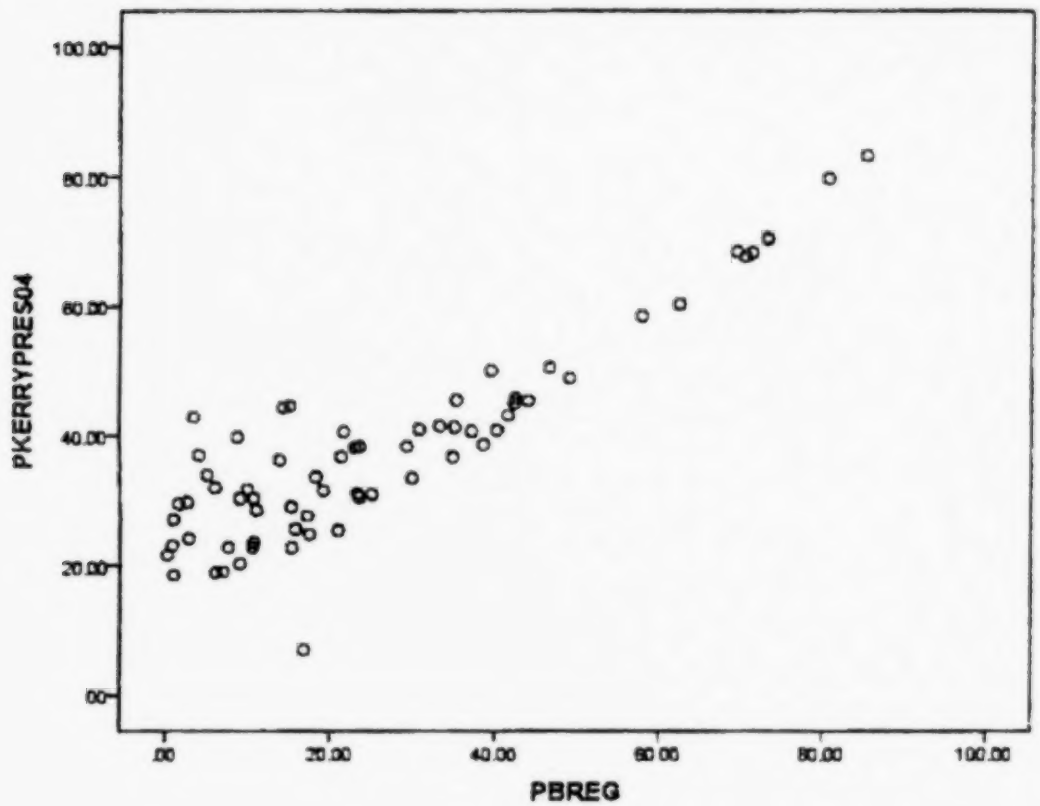


Chart 2: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2008 Presidential General

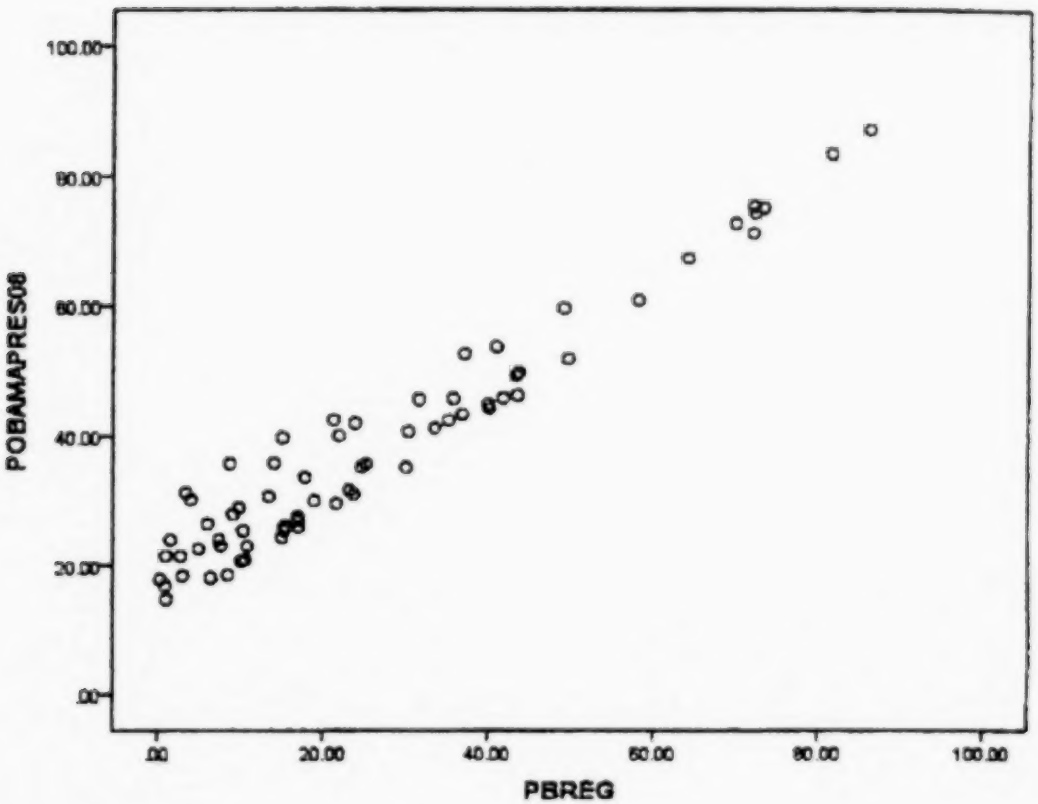


Chart 3: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Figures, 2008 US Senate General

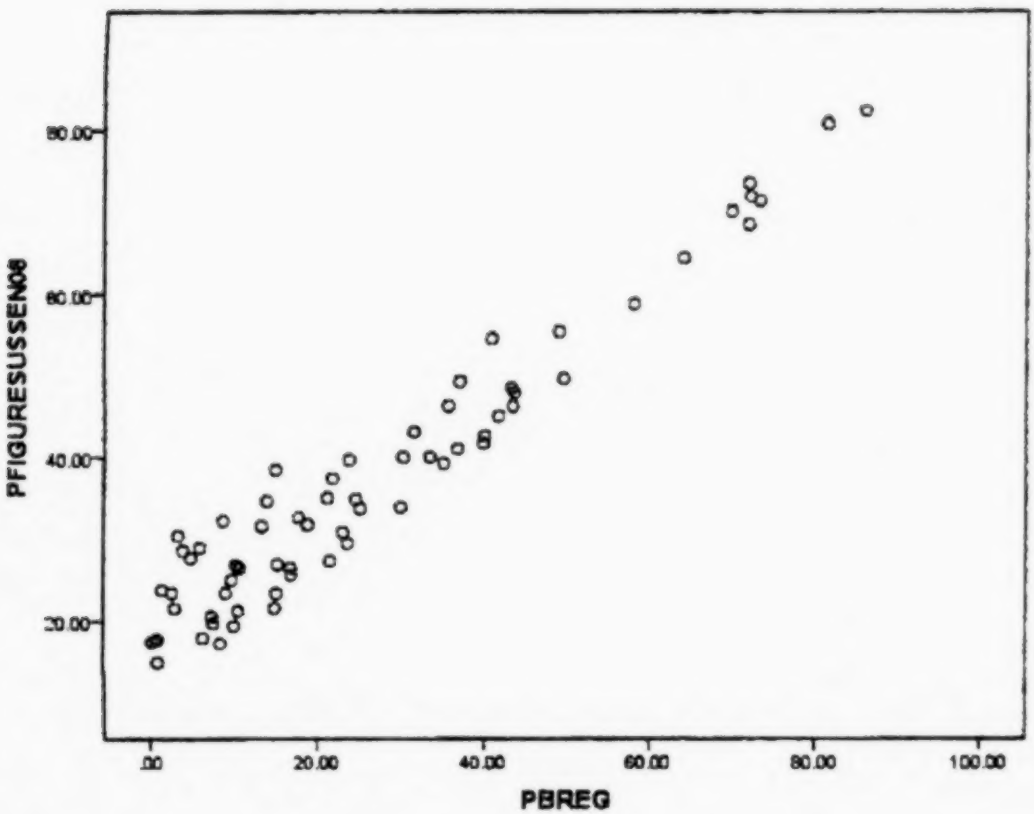


Chart 4: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Paseur, 2008 Justice 1 General

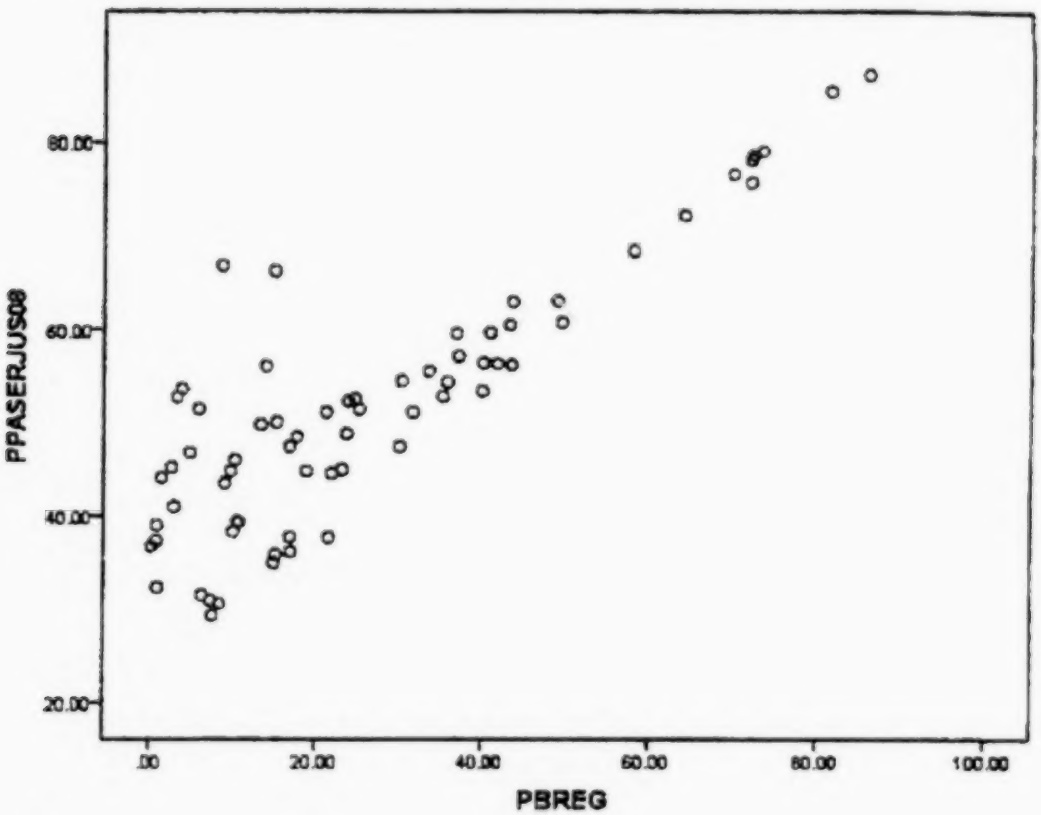


Chart 5: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2012 Presidential General

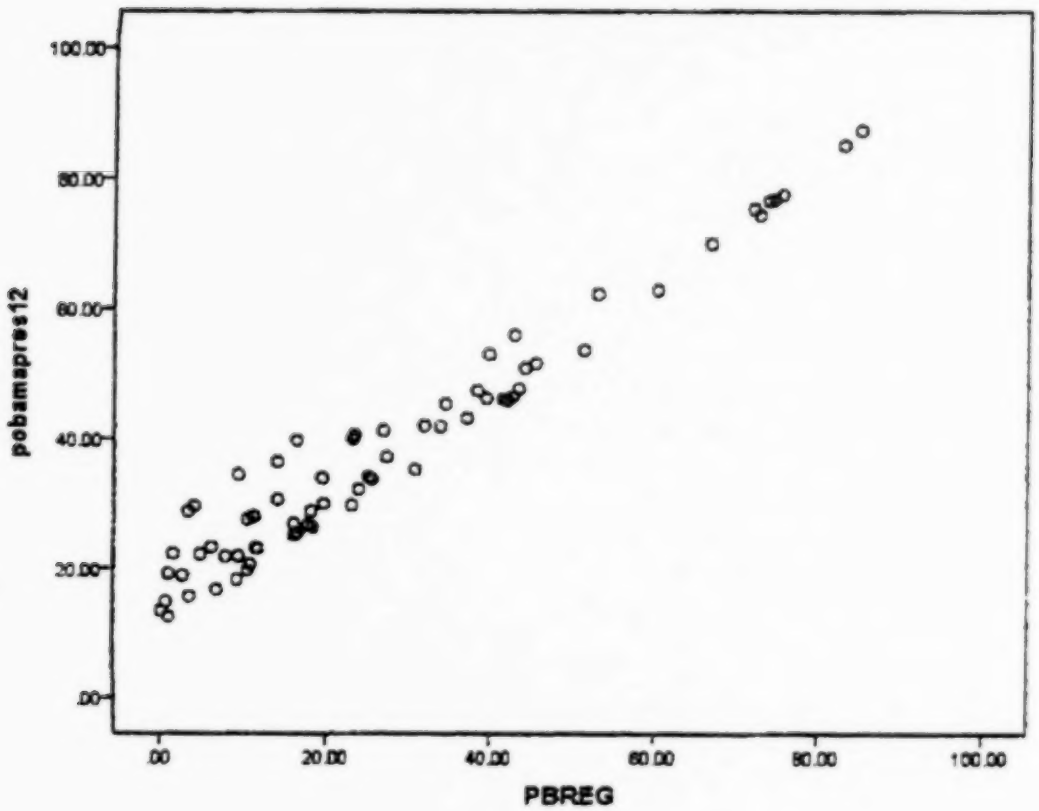


Chart 6: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Vance, 2012 Chief Justice General

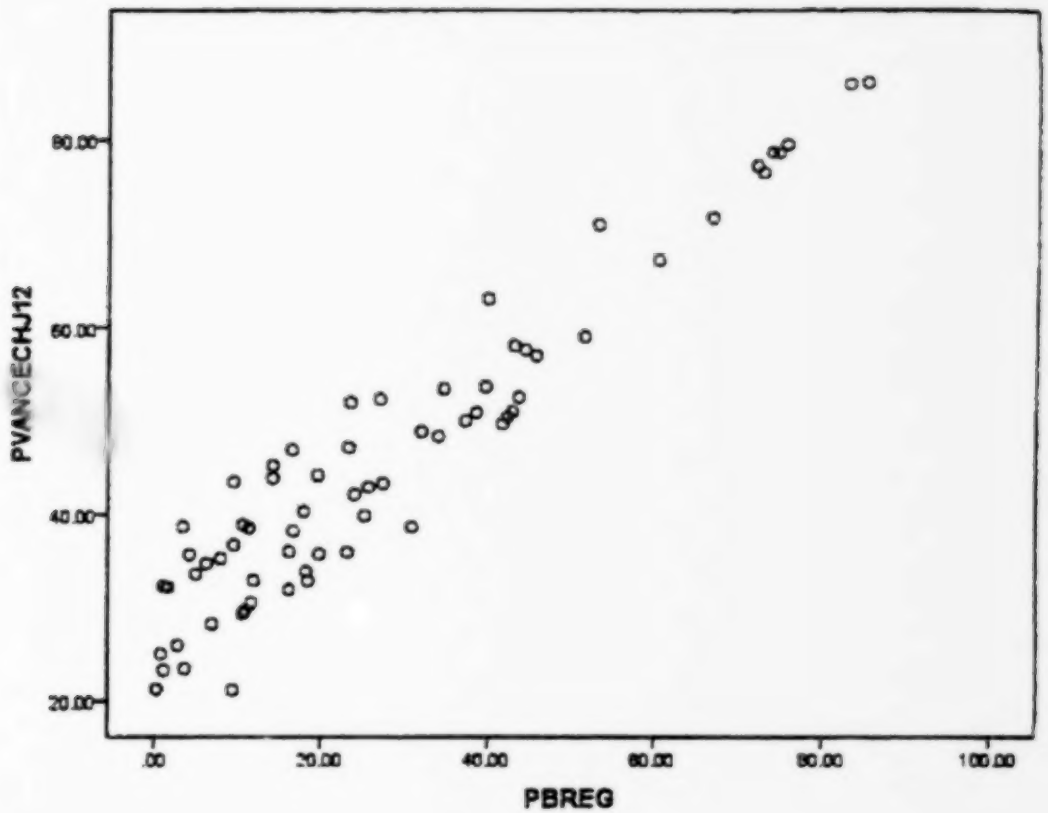
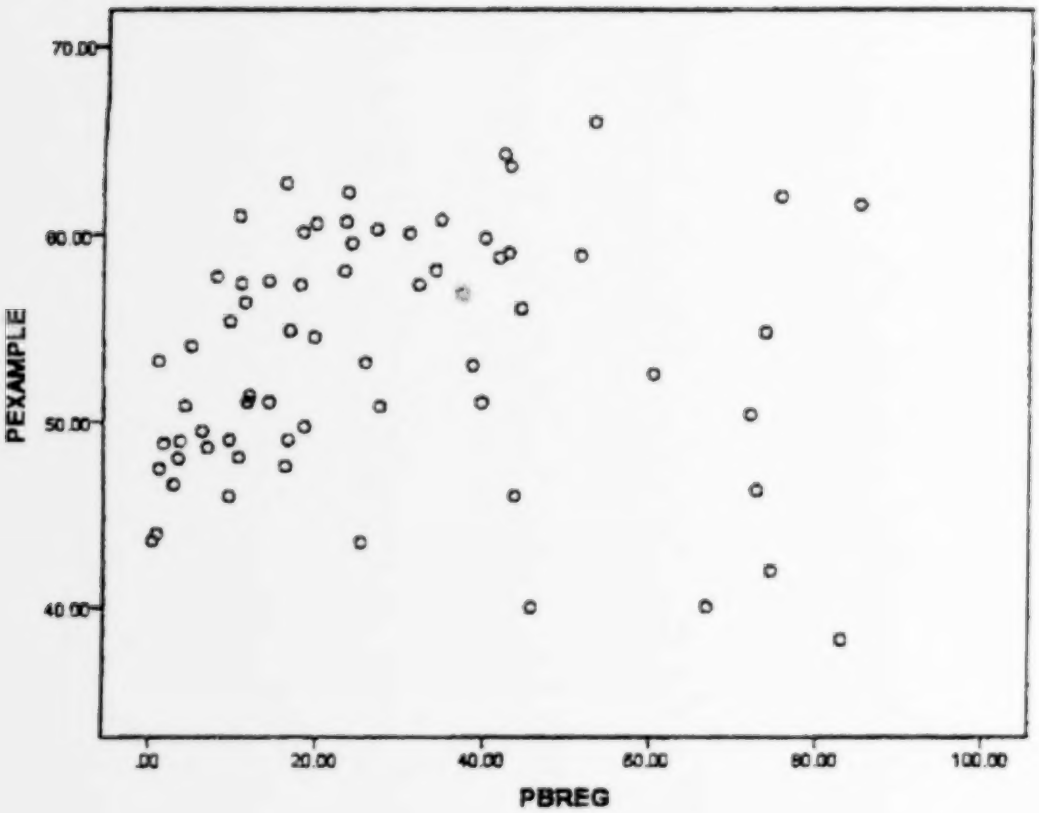


Chart 7: Sample Chart Showing a Lack of Polarization Between African American and White Registrants in Each County



Appendix II: Charts Showing Relationship Between Percentage of African American Registrants in Precincts and the Percentage of the Vote for Candidate of Choice of African American Voters in Jefferson County as Demonstrated In Table 3

Chart Jefferson1: Jefferson County Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2008 Presidential General

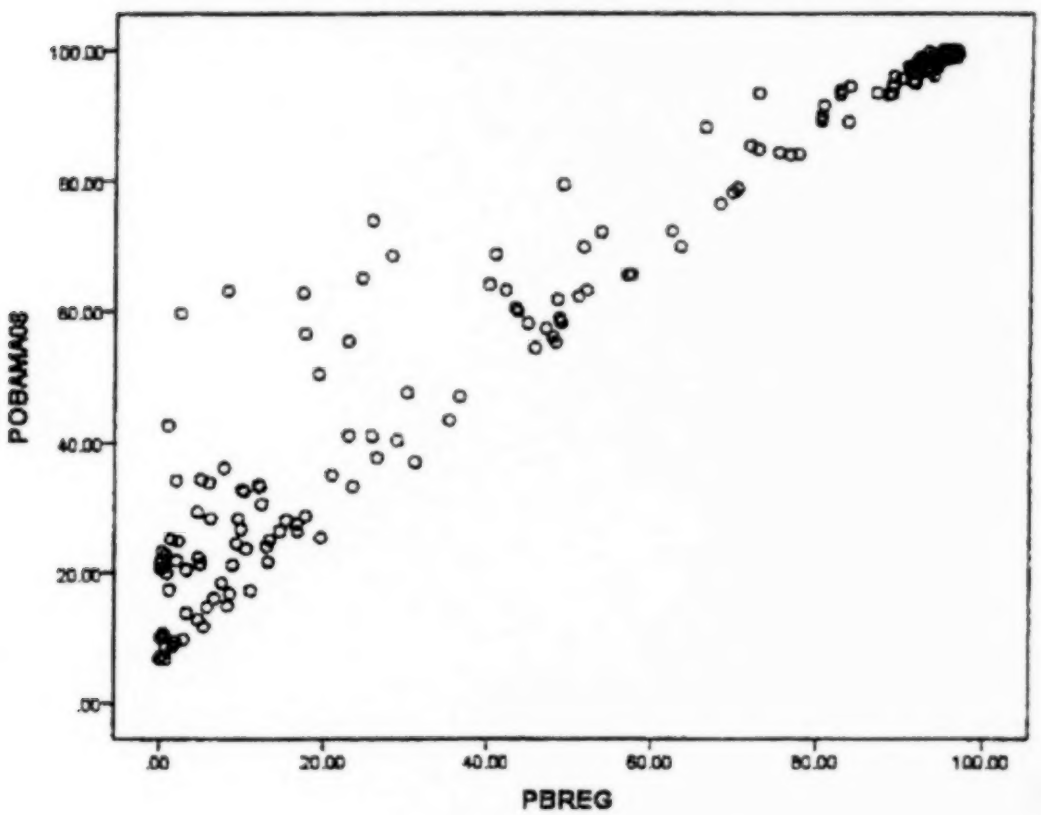


Chart Jefferson2: Jefferson County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Figures, 2008 US Senate General

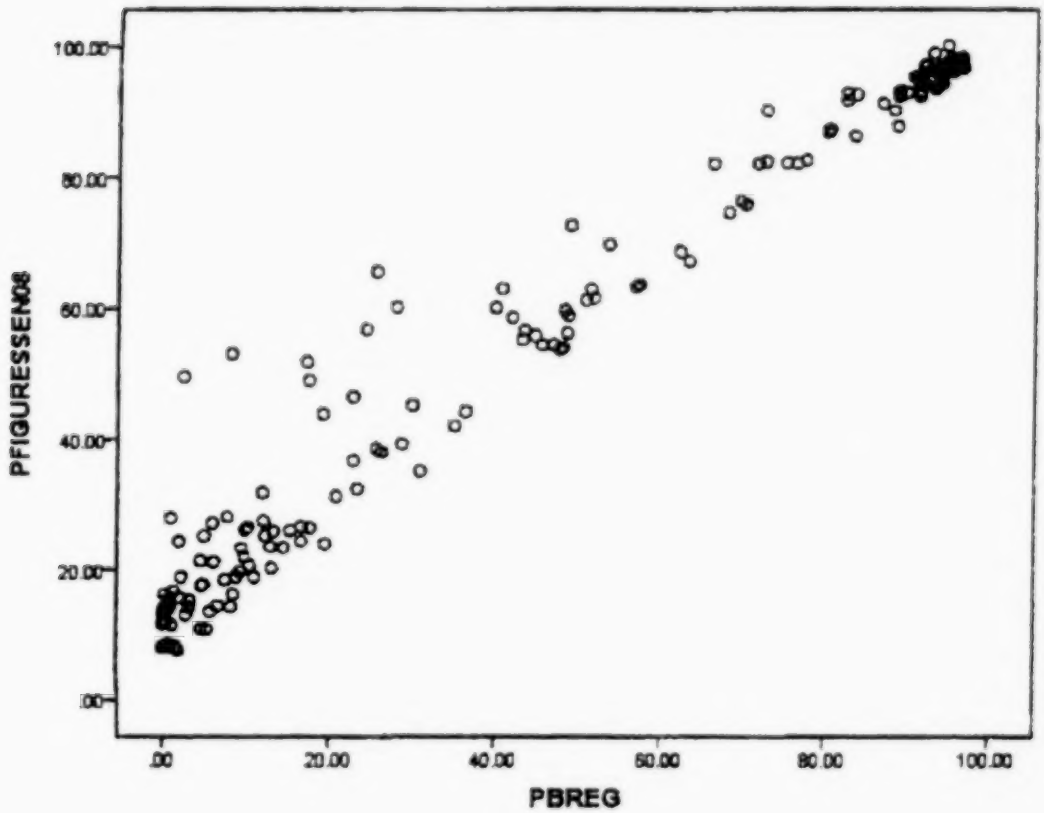


Chart Jefferson3: Jefferson County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Paseur, 2008 Justice 1 General

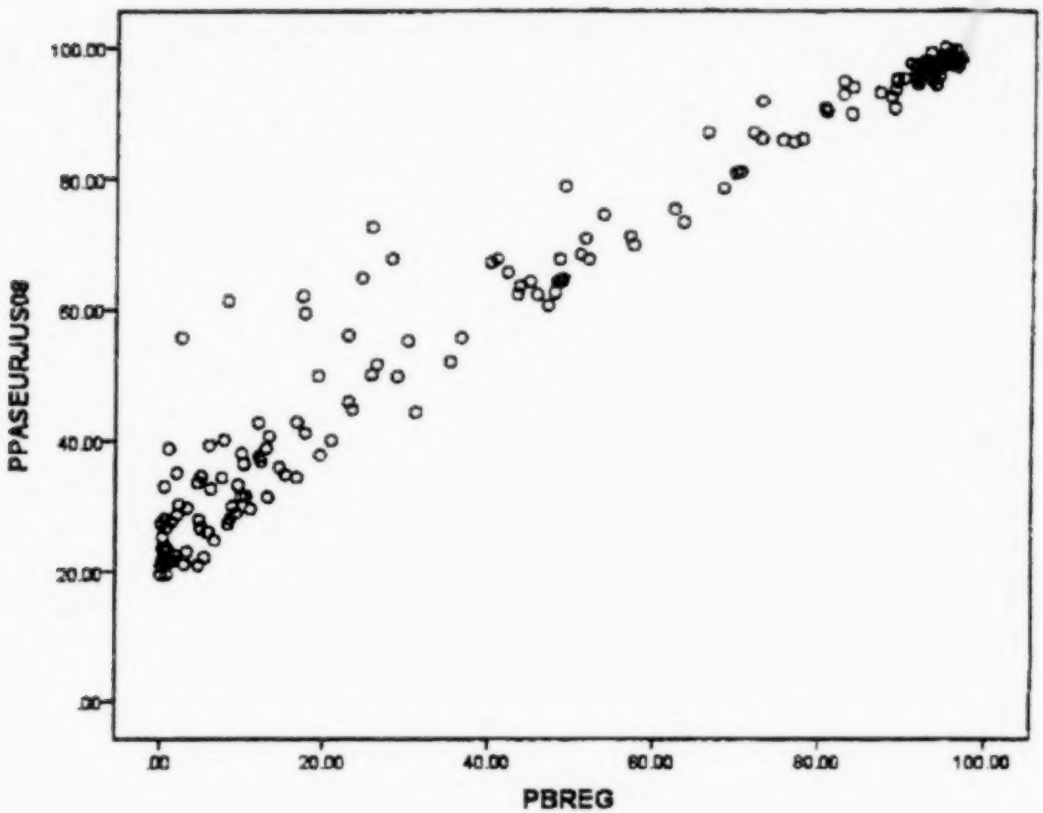


Chart Jefferson4: Jefferson County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2012 Presidential General

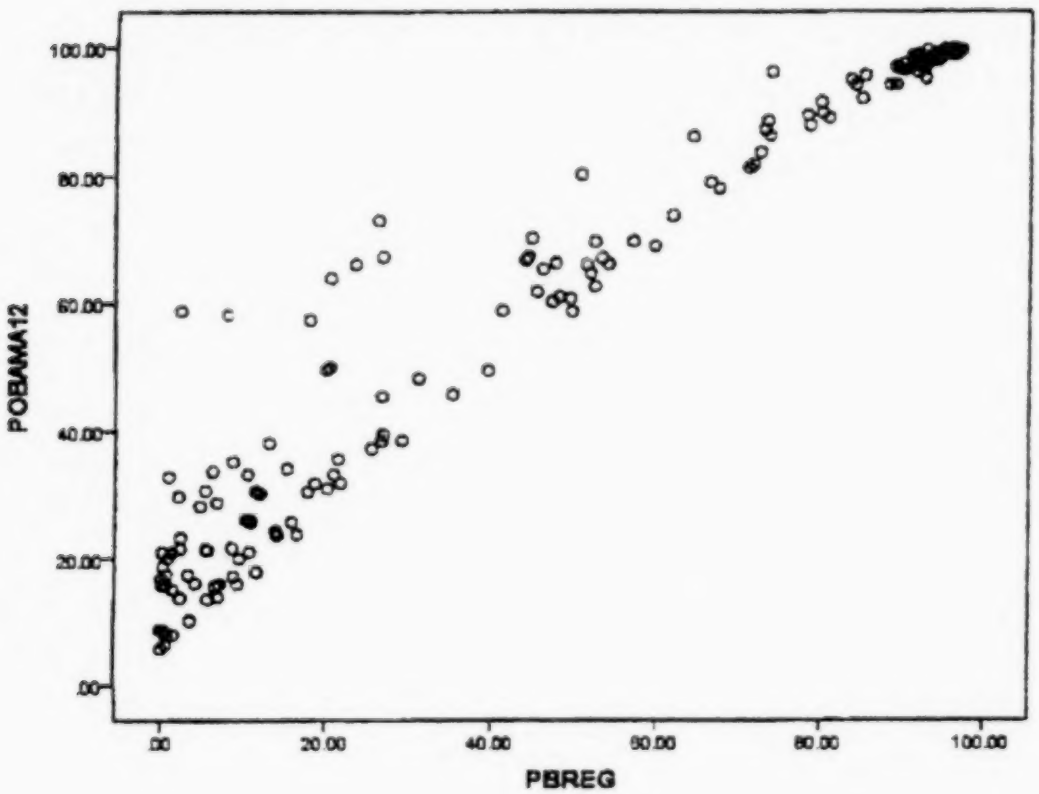
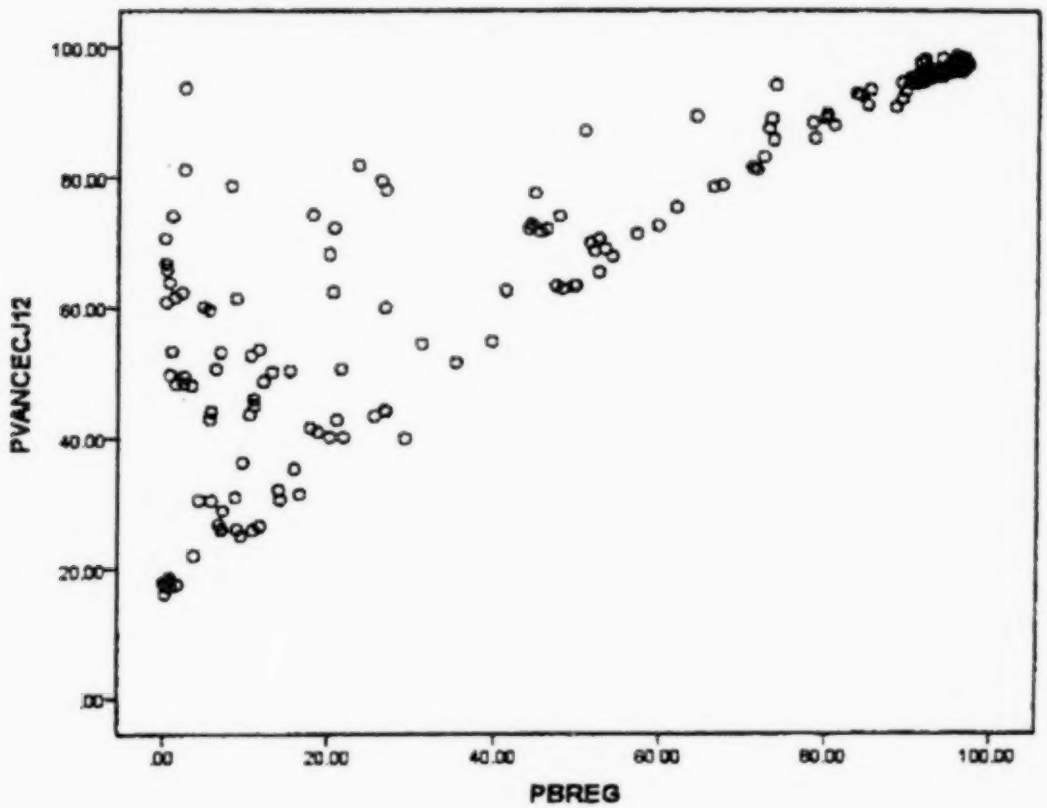


Chart Jefferson5: Jefferson County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Vance, 2012 Chief Justice General



Appendix III: Charts Showing Relationship Between Percentage of African American Registrants in Precincts and the Percentage of the Vote for Candidate of Choice of African American Voters in Madison County as Demonstrated In Table 4

Chart Madison1: Madison County Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2008 Presidential General

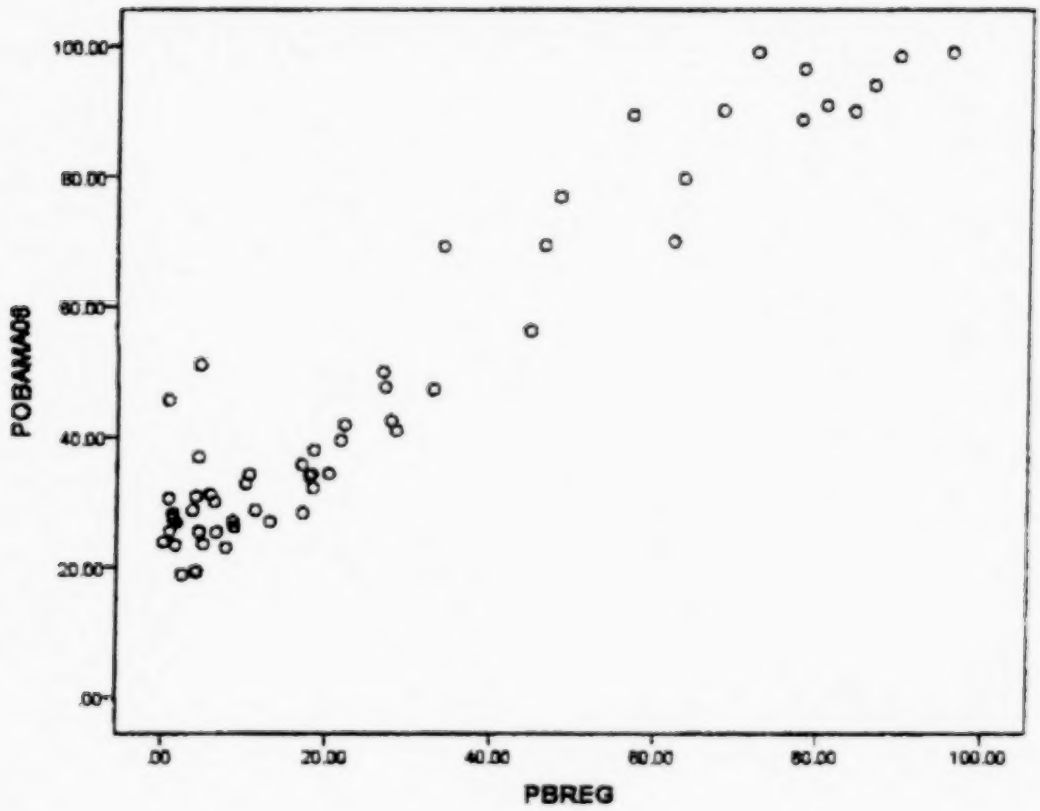


Chart Madison2: Madison County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Figures, 2008 US Senate General

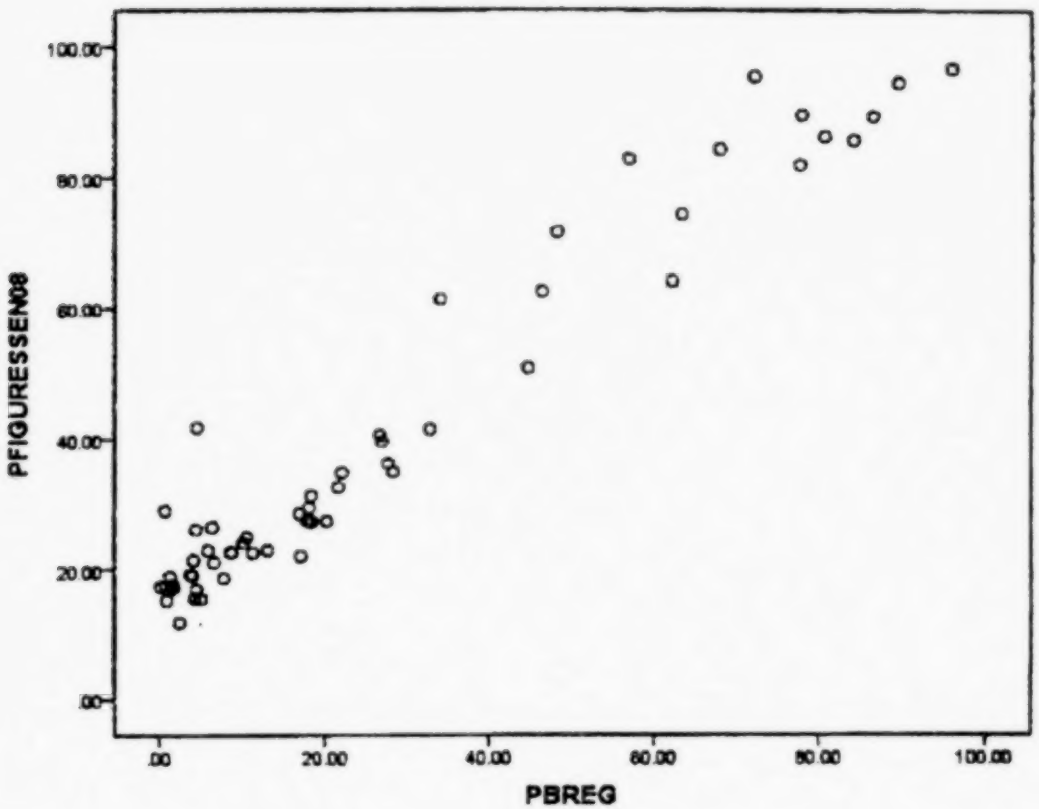


Chart Madison3: Madison County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Paseur, 2008 Justice 1 General

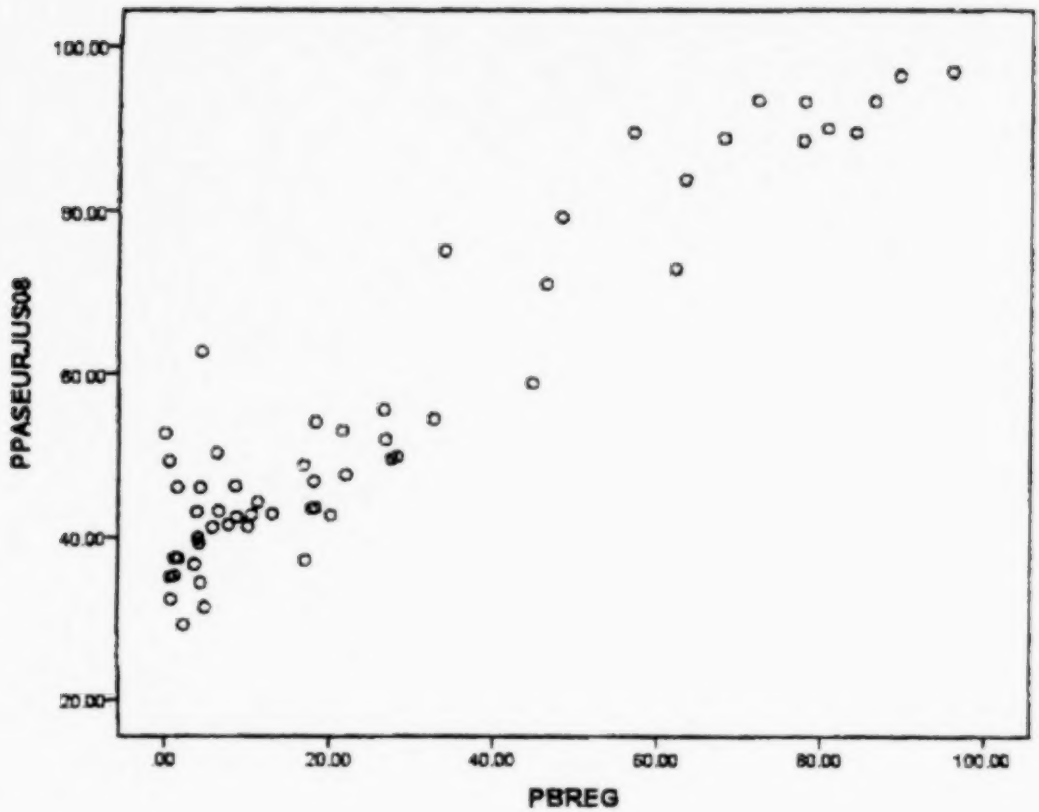


Chart Madison4: Madison County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2012 Presidential General

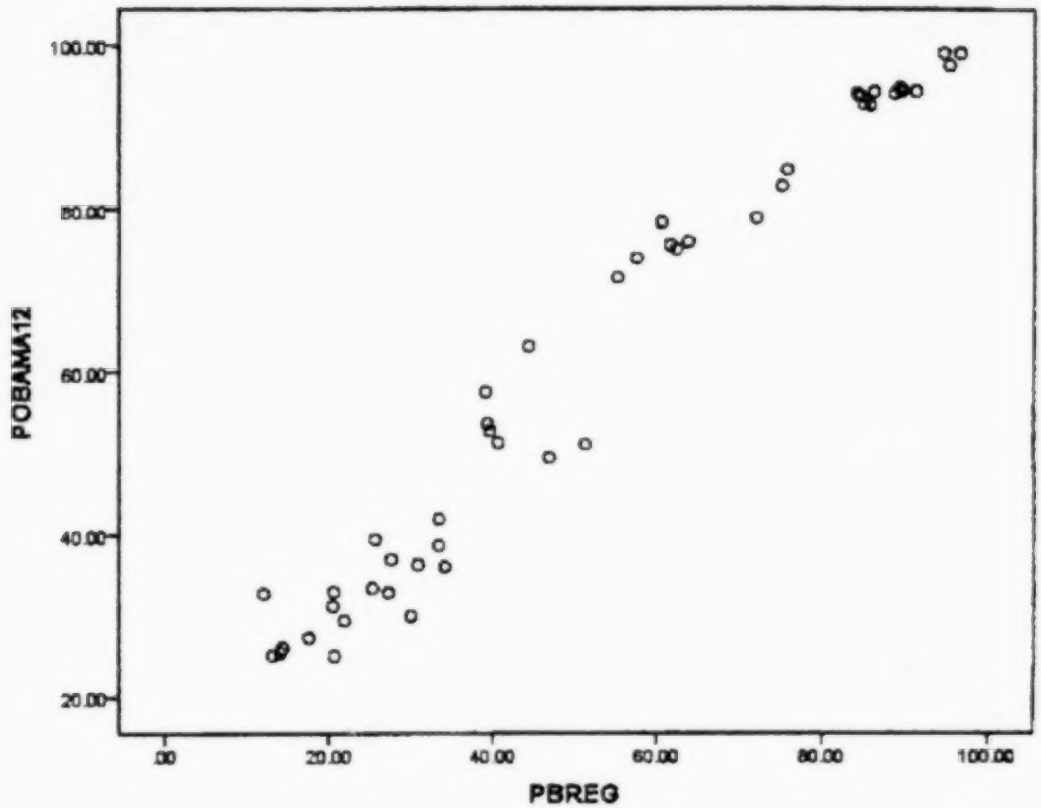
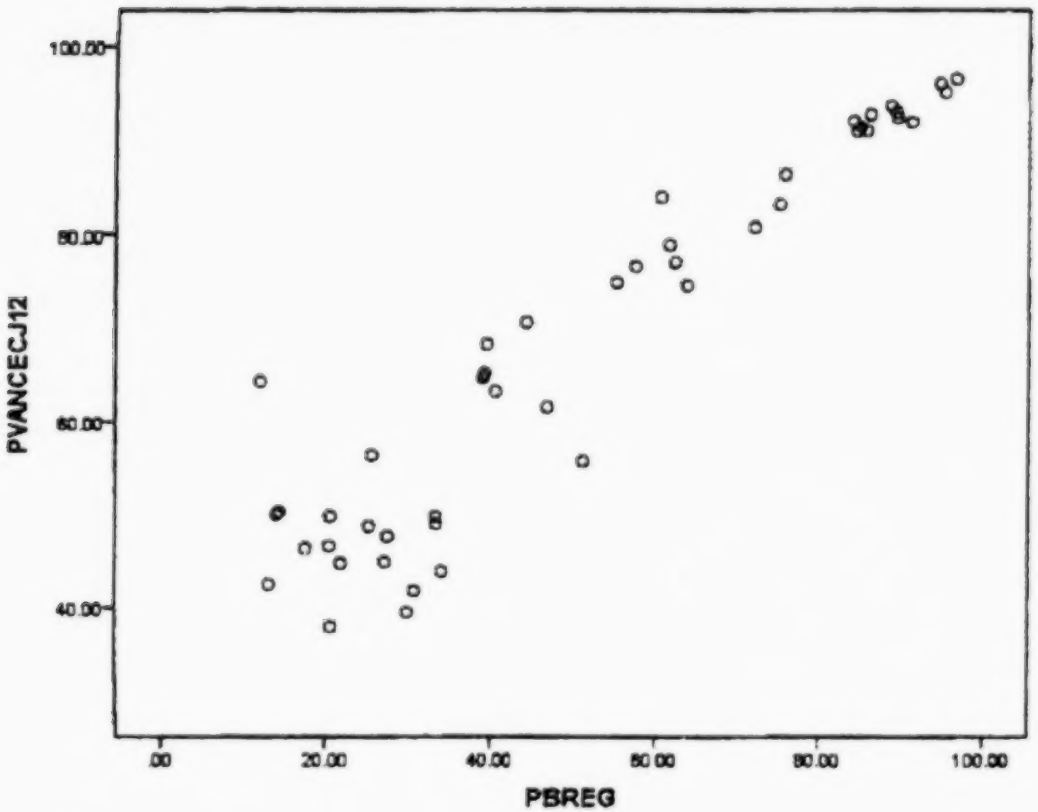


Chart Madison5: Madison County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Vance, 2012 Chief Justice General



Appendix IV: Charts Showing Relationship Between Percentage of African American Registrants in Precincts and the Percentage of the Vote for Candidate of Choice of African American Voters in Montgomery County as Demonstrated In Table 5

Chart Montgomery1: Montgomery County Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2008 Presidential General

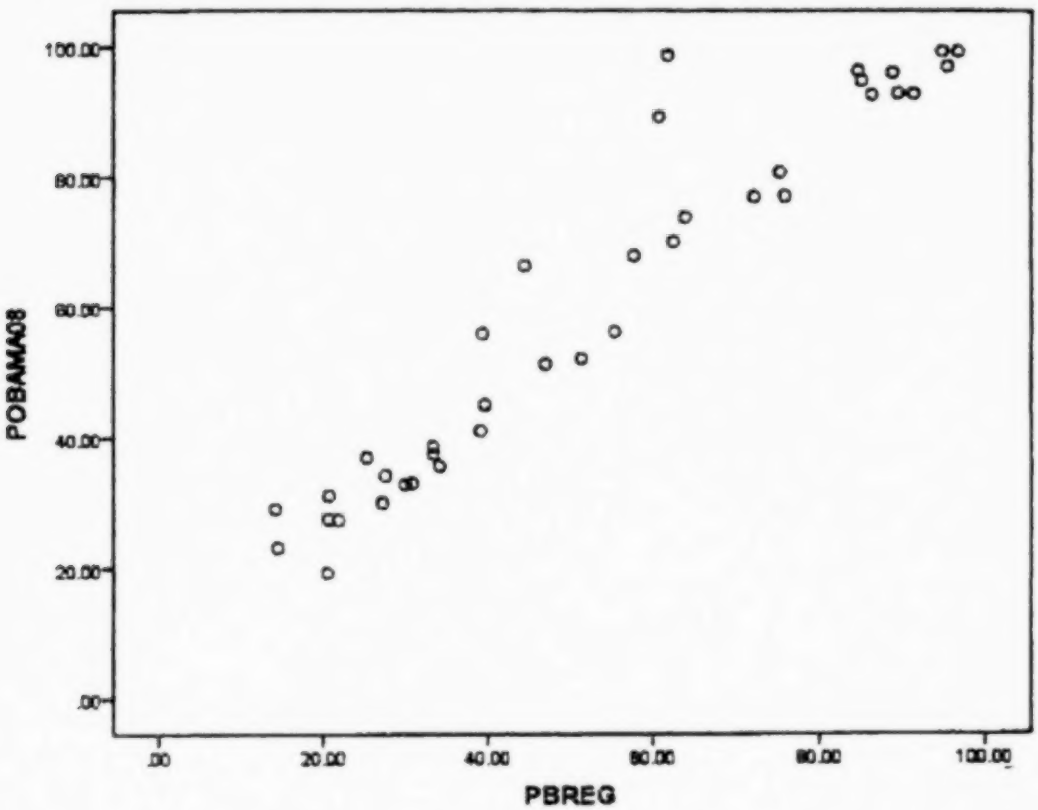


Chart Montgomery2: Montgomery County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Figures, 2008 US Senate General

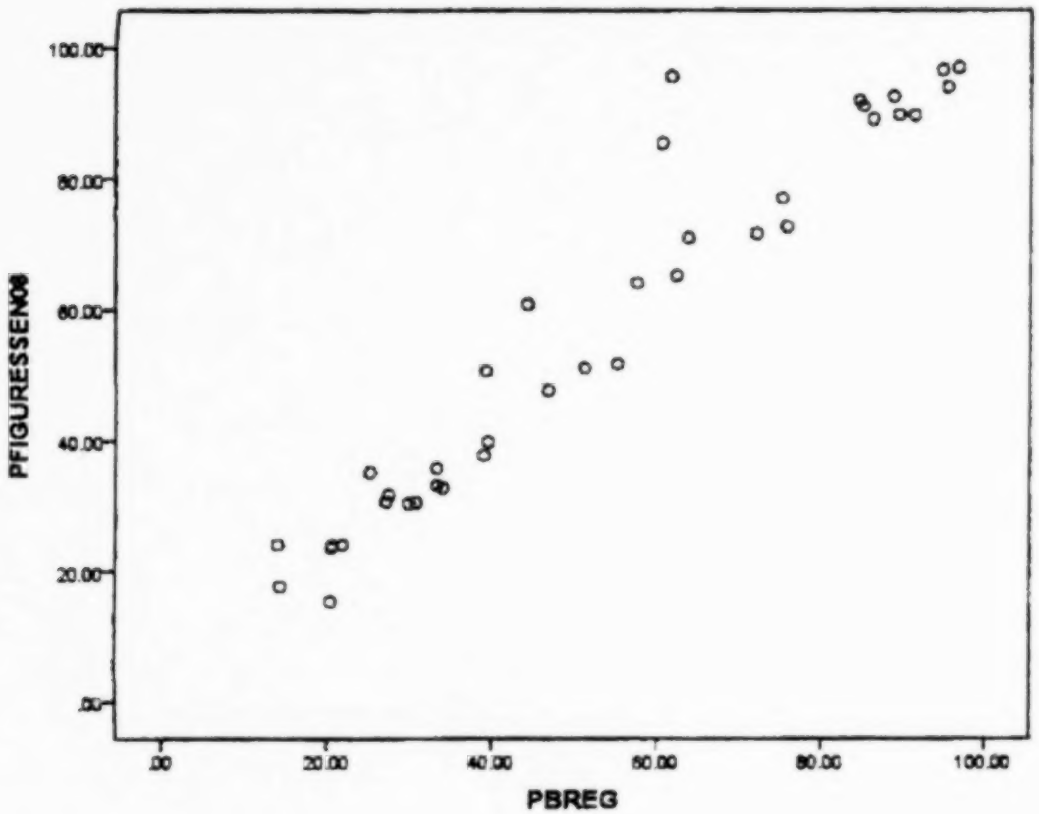


Chart Montgomery3: Montgomery County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Paseur, 2008 Justice 1 General

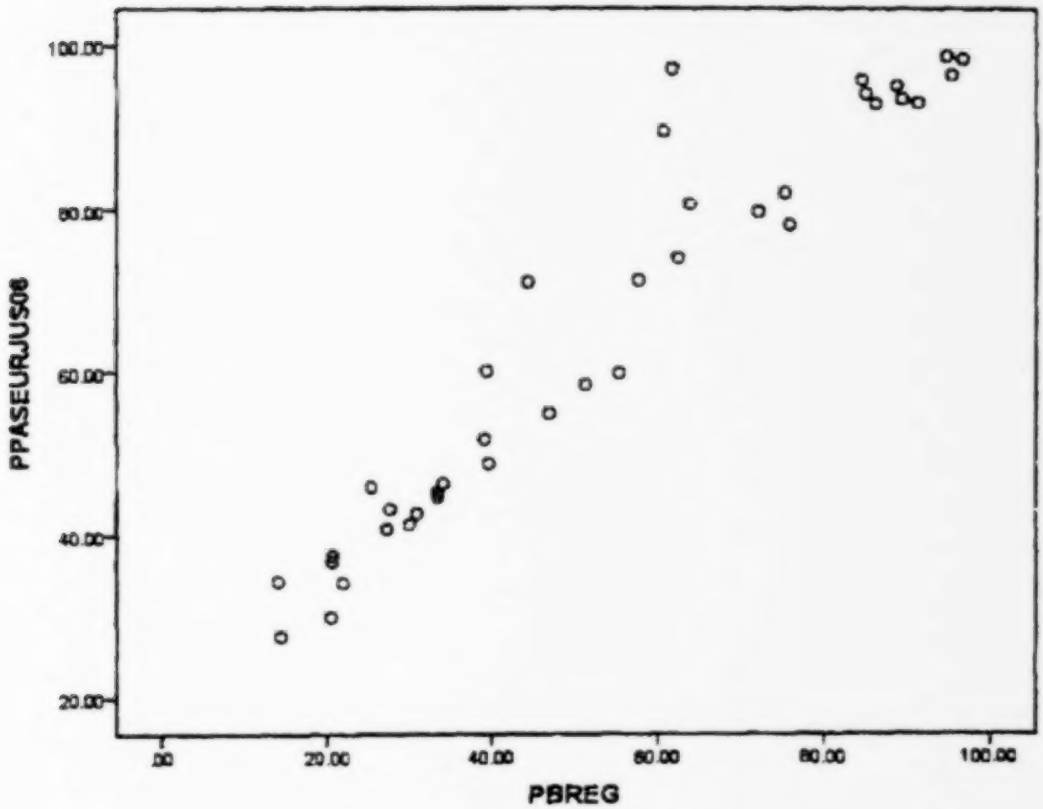


Chart Montgomery4: Montgomery County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for African American Democrat Obama, 2012 Presidential General

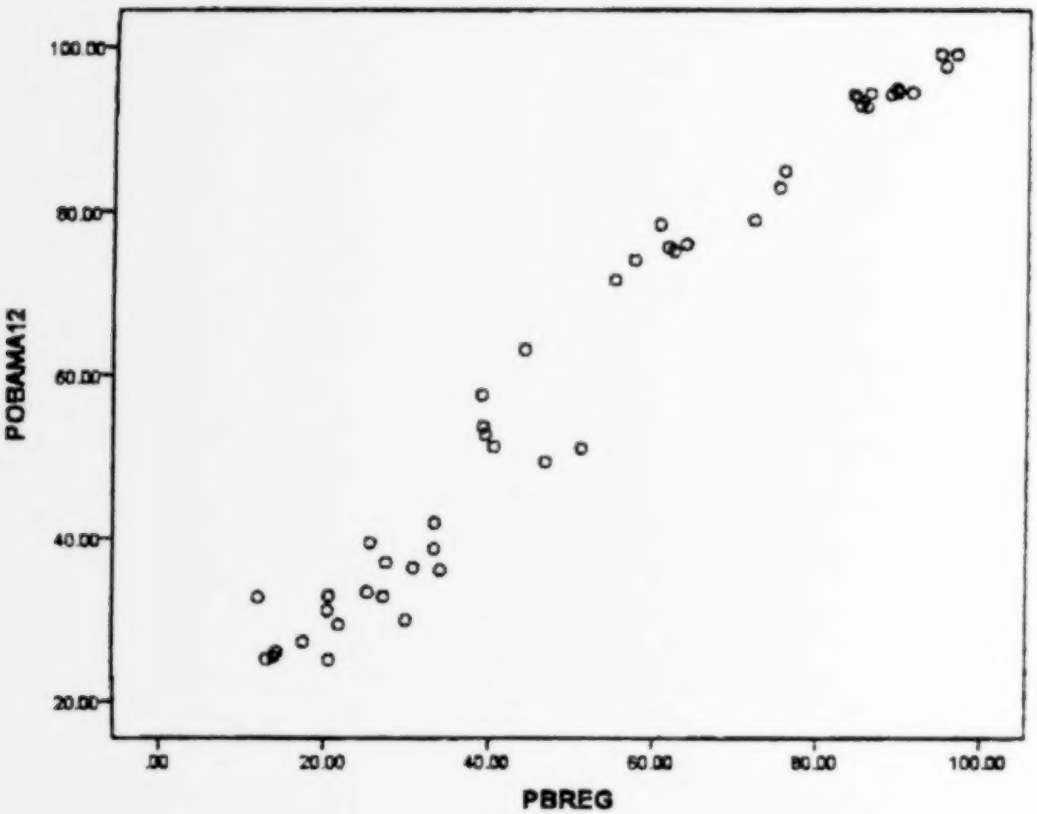
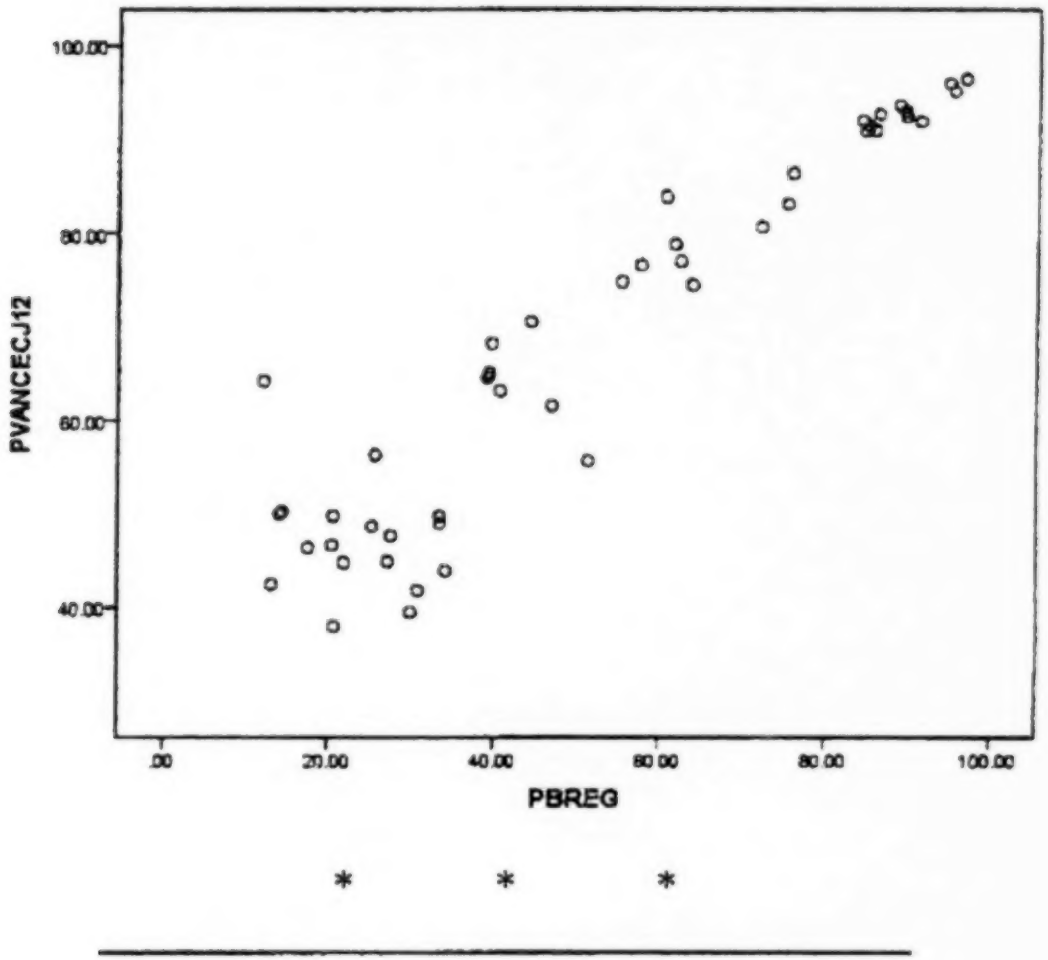


Chart Montgomery5: Montgomery County: Relationship Between the Percent of African American Registrants in Each County and the Percent of the Vote for White Democrat Vance, 2012 Chief Justice General



LEGISLATIVE REDISTRICTING COMMITTEE

9th HEARING

OCTOBER 6, 2011

Birmingham, Alabama

APPEARANCES

SENATOR GERALD DIAL
REPRESENTATIVE JIM McCLENDON
SENATOR VIVIAN FIGURES
Dorman Walker, Hearing Officer
Balch & Bingham, LLP
105 Tallapoosa Street
Suite 200
Montgomery, Alabama 36104

Donna Armstrong, CCR #550
Certified Court Reporter

PROCEEDINGS

* * *

REPRESENTATIVE SCOTT: Thank you for that. And now I will make sure I go to the website and check. And there was one other point that Senator Dunn made, and that is the integrity of the current minority representation throughout the state based upon population.

Two particular, I guess, redistricting issues; one involving cracking, where you have a disbursement of minorities within the districts so that you, potentially,

lose any effectiveness in selecting minority representation.

And then, the other issue is one of packing, where you pack so many minorities in to one district that you create or you limit the number of representatives that can win – win seats in either the House or the Senate.

Do you have some plan to deal with those issues of cracking and packing?

MR. WALKER: Certainly. Certainly. Thank you. And that is a very good point.

The – as you know, any plan that is passed by the Legislature has to be submitted to the Attorney General

* * *

MR. WALKER: No. I'm sure – you have asked two questions: Has the Committee done any preliminary maps? And are there any plans being drawn? The answer to the first one is no. The answer to second one is I'm sure there are lots of people drawing maps, but I have not seen those. And I don't know – I don't know who drew that map, but no – no plan has been given to me to review, and I'm not aware of – neither Senator Dial or Representative McClendon has seen a proposed plan.

REPRESENTATIVE MERIKA COLEMAN: Okay. Well, then, when will – as there – you know, I'm going – because we are going on record and even if we have

to repeat things over and over again, I want to make sure that it goes on record, some of the same things. The packing and cracking I'm very concerned about.

MR. WALKER: Certainly.

REPRESENTATIVE MERIKA COLEMAN: And making sure we that we don't pack all African Americans in a geographic area – or a geographic districts in addition to cracking it up so much that there is no opportunity for a minority person to end up within their district. I want to go on record saying that. But also, as we consider districts, as some of my colleagues have already stated, trying to keep those cities intact.

* * *

ALABAMA LEGISLATURE

PERMANENT JOINT
LEGISLATIVE COMMITTEE

FOR REAPPORTIONMENT

IN RE: PUBLIC HEARING

OCTOBER 13, 2011 DEMOPOLIS, ALABAMA

PROCEEDINGS held in the above-styled cause, and moderated by the Honorable Dorman Walker, at the Demopolis City Civic Center, 501 North Commissioner Avenue, Demopolis, Alabama, on Thursday, October 13, 2011, commencing at 3:00 p.m.; and reported by Virginia Denese Barrett, Court Reporter and Commissioner for the State of Alabama at Large.

APPEARANCES:

AS HEARING OFFICER:

Mr. Dorman Walker
BALCH & BINGHAM, LLP
105 Tallapoosa Street, Suite 200
Montgomery, Alabama 36104.

COMMITTEE MEMBERS:

Senator Gerald Dial, District 13, Co-Chair
Representative Jim McClendon, District 50, Co-Chair
Senator Vivian Davis Figures, District 33, At Large

PROCEEDINGS

* * *

MR. ALBERT TURNER: I know you've got a six o'clock meeting in Tuscaloosa, and I ain't going to take all your time. But I just want to make sure that the other point is that this racial thing. We don't want these Republicans that's going to be in charge of the legislature to draw all these black people into six or seven districts and leave all these other thirty or twenty-nine senate districts to white Republicans or conservative white Democrats. We want to make sure that we have no race packing at all. And that is one of the criteria that the Department of Justice looks at, that there be no race packing.

* * *

LEGISLATIVE HEARINGS ON
REDISTRICTING LOCATIONS

TUSCALOOSA, ALABAMA

OCTOBER 13, 2011

IN RE: LEGISLATIVE HEARINGS ON REDISTRICTING:

Taken before Stone Arledge, ACCR# TL2019, on Thursday, October 13th, 2011, commencing at 6:33 p.m. at the Bryant Conference Center, 240 Paul Bryant Drive, Tuscaloosa, Alabama 35487.

COMMITTEE MEMBERS:
SENATOR GERALD ALLEN – DISTRICT 21
SENATOR VIVIAN FIGURES – DISTRICT 33
SENATOR GERALD DIAL – DISTRICT 13
REPRESENTATIVE JIM McCLENDON – DISTRICT 50

HEARING OFFICER: DORMAN WALKER

* * *

MR. WALKER: Well, you've – you've hit another area where there's a gradient instead of a guideline. In the past, it used to be 65 or 65 – above 65 – 60 percent. 65 was thought to be maybe the correct number, at least I remember in 1990, on the belief that – which was brought out by the evidence that minority communities had less of [an] ability to get to the polls and lower turnout; therefore, in order to make it an effective majority, black or other minority district, you needed to have a higher level. I'm pretty sure that if you were to send a district that was 65 percent black to the Department of Justice now, they

would wonder why you were packing it, and they'll be looking for, my understanding is, much lower levels. I mean a black majority would certainly be above 50, but 55 may be extreme in some cases.

* * *

ALABAMA LEGISLATURE PERMANENT JOINT LEGISLATIVE COMMISSION ON REAPPORTIONMENT LEGISLATIVE REAPPORTIONMENT COMMITTEE

20TH HEARING

SELMA, ALABAMA

SENATOR SANDERS: One of many concerns is we are not to have any less African-American – the majority African-American districts than you have, and that those districts ought not be less than 62 percent. And I want to say why 62 percent, ought not to be less than 62 percent. Many times a population of a district isn't reflective of the voters at all in that district. Sometimes a lot of people don't vote. Sometimes a lot of people can't vote. They might be in prison or other kinds of institutions. Sometimes a lot of folks are discouraged for one reason or another. So I would hope that 62 percent is a minimal for the majority African-American district. Second, I would hope that there's not packing.

* * *

(Doc. 30-28, Ex. C-21, p. 6)

REPRESENTATIVE JACKSON: Even in that process, I understand that. But as we tried to amend those bills on the floor of the House and, you know, nothing is accepted, no amendments was – you know, I kind of feel like this is the same way that these House and Senate districts is going to be done. And I have a commonality in my district. We – people – I know they've compacted those districts, put the minorities in one district they could put them in, but we didn't feel that that was fair. Let me say even in my district, having five counties – and they're all rural counties from Choctaw all the way over to Conecuh moving from Marengo and Monroe – and I wanted some – you know, some continuity in that process. And I would like to see what's going to become of this district even with those new numbers. So I am very concerned about that. You know, and having a minority district over there, it's got to be ninety-nine percent minority.

HEARING OFFICER: Right.

REPRESENTATIVE JACKSON: It could be sixty-two percent or sixty-five percent. That's what

we're trying to [illegible] our good friends before on that. Nobody listens too well to us.

(Doc. 30-23, Ex. C-16, p. 8)

* * *

MR. DOUGLAS: My name is Thamus Douglas. I'm a member of the Clarke County Board of Education representing District 4.

HEARING OFFICER: Thank you, Mr. Douglas.

MR. DOUGLAS: I understand that because of the economy in our area, that our minority population are migrating north. And if we kept the counties together, it would be nice. But if we kept the counties together, we would lose our minority representatives. And I feel like that you-all need to zone it so that we can have a voice in our government. And I'm through.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.	)	**2:12-CV-00691-WKW-MHT-WHP (Three Judge Court)**
Plaintiffs	)	
v.	)	
THE STATE OF ALABAMA, et al.	)	
Defendants	)	
DEMETRIUS NEWTON, et al.	)	**2:12-CV-01081-WKW-MHT-WHP (Three Judge Court)**
Plaintiffs	)	
vs.	)	
STATE OF ALABAMA, et al.	)	
Defendants	)	

AMENDMENT TO JOINT STIPULATION OF FACTS

(Filed Aug. 13, 2013)

Come now the parties to these consolidated actions and in compliance with the Court's Order on PreTrial Hearing, Doc. 153 at 4, and files this Amendment to the previously filed Corrected Joint Stipulation of Facts to stipulate the following:

19. Newton Plaintiff Stacey Stallworth is an adult, African-American citizen who is a registered voter of Montgomery County. Under the former house plan, Stallworth voted in HD 73, which is represented by Joe Hubbard, a white Democrat. Under the State's proposed plan, Stallworth will vote in HD 77, which is represented by John Knight, an African-American Democrat.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al. Plaintiffs v. **THE STATE OF ALABAMA, et al.** Defendants	**2:12-CV-00691-WKW-MHT-WHP (Three Judge Court)**
DEMETRIUS NEWTON, et al. Plaintiffs vs. **STATE OF ALABAMA, et al.** Defendants	**2:12-CV-01081-WKW-MHT-WHP (Three Judge Court)**

AFFIDAVIT OF JOE L. REED

(Filed Jul. 11, 2013)

STATE OF ALABAMA)

COUNTY OF MONTGOMERY)

COMES NOW before me, a notary public in and for said county and said State and, being first duly sworn, deposes and states:

1. My name is Joe L. Reed. I am over the age of 21 years, have personal knowledge of the facts set forth, and am competent to testify regarding them.

2. I am the President/Chairman of the Alabama Democratic Conference (hereinafter referred to as the "ADC").

3. The mission of the ADC is simple. It is to "organize" and to "unify" the vote of the African American population and also to make the African American vote and opinion appreciated and respected.

4. The ADC focuses on voter registration drives, monitoring voting, employing African Americans, and helping African Americans to be able to run for office and to hold high positions.

5. The ADC uses its funds and resources to educate voters, for Get Out the Vote efforts, to endorse political candidates of all races for elected and appointed offices, to lobby for and against legislation, to sponsor reapportionment plans statewide, to support lawsuits dealing with political matters and elections, and to organize and educate voters regarding political issues relevant to the organization's purpose.

6. The ADC has members in nearly every county in the State of Alabama, including Calhoun County, Coosa County, Elmore County, and Talladega County.

7. As a result of the State's redistricting efforts in 2012, the excessive division of counties and voting precincts will create many unnecessary problems for candidates and voters, and these problems will fall most heavily on minority voters.

8. It is sometimes essential to split counties and precincts to comply with legal requirements, but there is a strong governmental interest in minimizing the number of counties and precincts split, especially from the perspective of minority voters and candidates. The division of existing voting precincts by district lines will, of course, necessitate the realignment of precinct boundaries and the reassignment of voters to new precincts. The process of reassigning voters will require considerable effort by the Boards of Registrars. Many of the Boards of Registrars, in my experience, lack technical skills.

9. The precinct splits also are likely to require a number of additional polling places. Locating and securing accessible sites with appropriate space and parking will involve time and resources on the part of county government, and we can no longer count on Section 5 to make sure the new polling places are not discriminatory.

10. The problems for the counties are less serious compared to the problems for voters who will need to be notified. Reassignment of voters to new precincts can, in the nature of things, result in mistakes: voters may be assigned to the wrong precinct. That has been the case in the past. Voters also must

learn of their new polling place assignments. That in turn requires knowledge that the polling place assignments have been changed or may have been changed, and the ability to ascertain the correct new assignment. Voters who lack internet access or lack reading skills – disproportionately minority voters – are at a severe disadvantage. Voters must actually get to the new polling places as well, which may be in an unfamiliar neighborhood. A disproportionate number of minority voters will not be able to navigate this process and will be discouraged from voting, or will go to the wrong polling location and lack the time, energy and resources to get to the correct site to cast a ballot.

11. As a practical matter, many minority voters rely on political campaigns and organizations to get such election information, and also to obtain rides to the polls. The changes flowing from the precinct splits will divert time and resources from minority campaigns and organizations like the ADC, which is already at a severe financial disadvantage. To make things worse, the Legislature has taken steps to defund black political organizations like the ADC by cutting off funds from sources like the Democratic Party, unions, and advocacy groups through the ban on transfers to the ADC via political action committees (PACs), and by its attacks on the AEA. Consequently, the ADC's resources and personnel will be undoubtedly be stretched thin to the point that they will not be able to meet increased demands, resulting

in a disproportionate number of minority citizens being able to vote.

12. The House and Senate plans increase the problems for minority voters, campaigns and organizations by the way the new district lines split many counties. Many of the county splits are unnecessary, and the House and Senate plans redraw a number of minority districts in a very irregular, contorted manner. Organizations that provide rides to the polls or engage in other "Get Out the Vote" activities will have to reorganize or form new alliances with shifts to new House, Senate, Congressional, County Commission, etc. type assignments. The irregularity of district lines is an impediment to such campaign activities, and will further stretch limited minority resources. As a result, a disproportionate number of minority citizens will not be able to vote.

13. The need for voter education and organization activities will be extraordinary as well. The party primary elections will be held on Tuesday, March 4, 2014. In addition to the need to inform voters of changes in district and polling places, the State of Alabama has enacted a new voter identification law. Alabama has not finalized its procedures for implementing this plan and for notifying voters of the requirement. A new voter ID requirement will generate confusion, and an effective campaign will have to spend time and resources educating voters in a very short time. In Georgia it took two years and a major publicity campaign.

14. The ADC is particularly concerned with the special difficulty of assisting voters who cannot read or who rely on Spanish translations. The state has no procedures for publicizing election information in Spanish or in any Asian languages. These citizens face unremitting hostility from state and local officials and regularly require assistance in voting.

15. Ultimately, some boundary changes are necessary. Some counties and precincts have to be split to comply with federal requirements. However, there is no federal law requirement that to split other counties that the House and Senate plans fracture. The State's plans go far beyond what is necessary and they split counties and precincts in ways that are unnecessary and illogical.

16. The State's House and Senate plans will disrupt existing minority political channels and systems, and add to the financial costs of minority candidates and others supporting minority participation in the new districts. Aside from the problems that the plan creates in terms of the opportunity of minority voters to elect candidates of their choice to the Legislature, the plans place new burdens on minority voters and make it harder for them to vote. As a result of these plans, many minority citizens will be unable to cast ballots in the 2014 elections.

FURTHER AFFIANT SAYETH NOT

/s/ Joe L. Reed
JOE L. REED

SWORN TO and SUBSCRIBED to this 9th of July, 2013

/s/ Kathy Mashan
NOTARY PUBIC

[My Commission expires 07/20/2013]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-691 WKW-MHT-WHP
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-1081 WKW-MHT-WHP

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO NEWTON PLAINTIFFS' CLAIMS

* * *

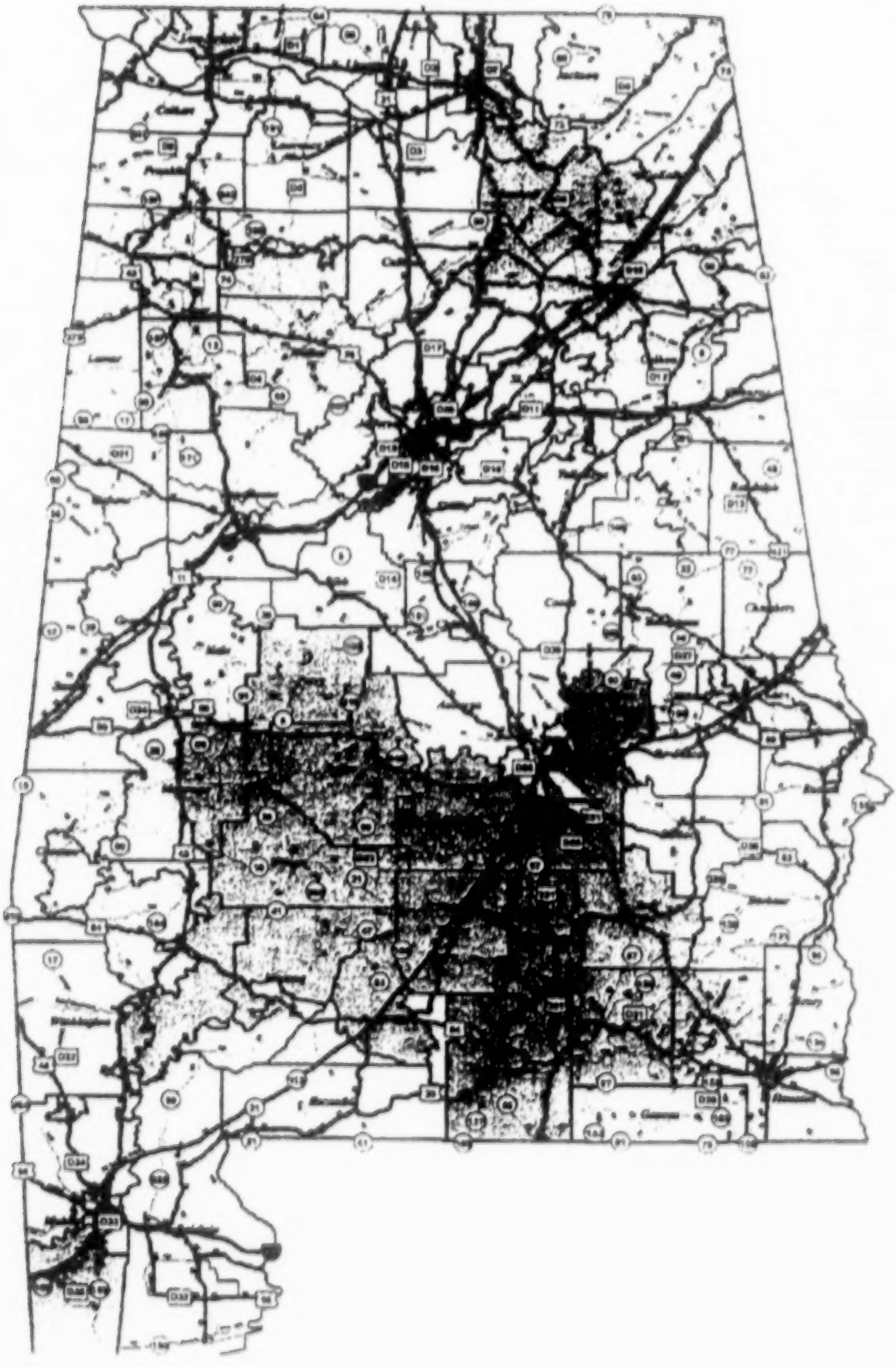
Newton Plaintiff Stacey Stallworth

197. Newton Plaintiff Stacey Stallworth lives in HD 73 in the 2001 House plan, which was represented by Joe Hubbard, a white Democrat. Exhibit P-7 at 7, lines 16-20.

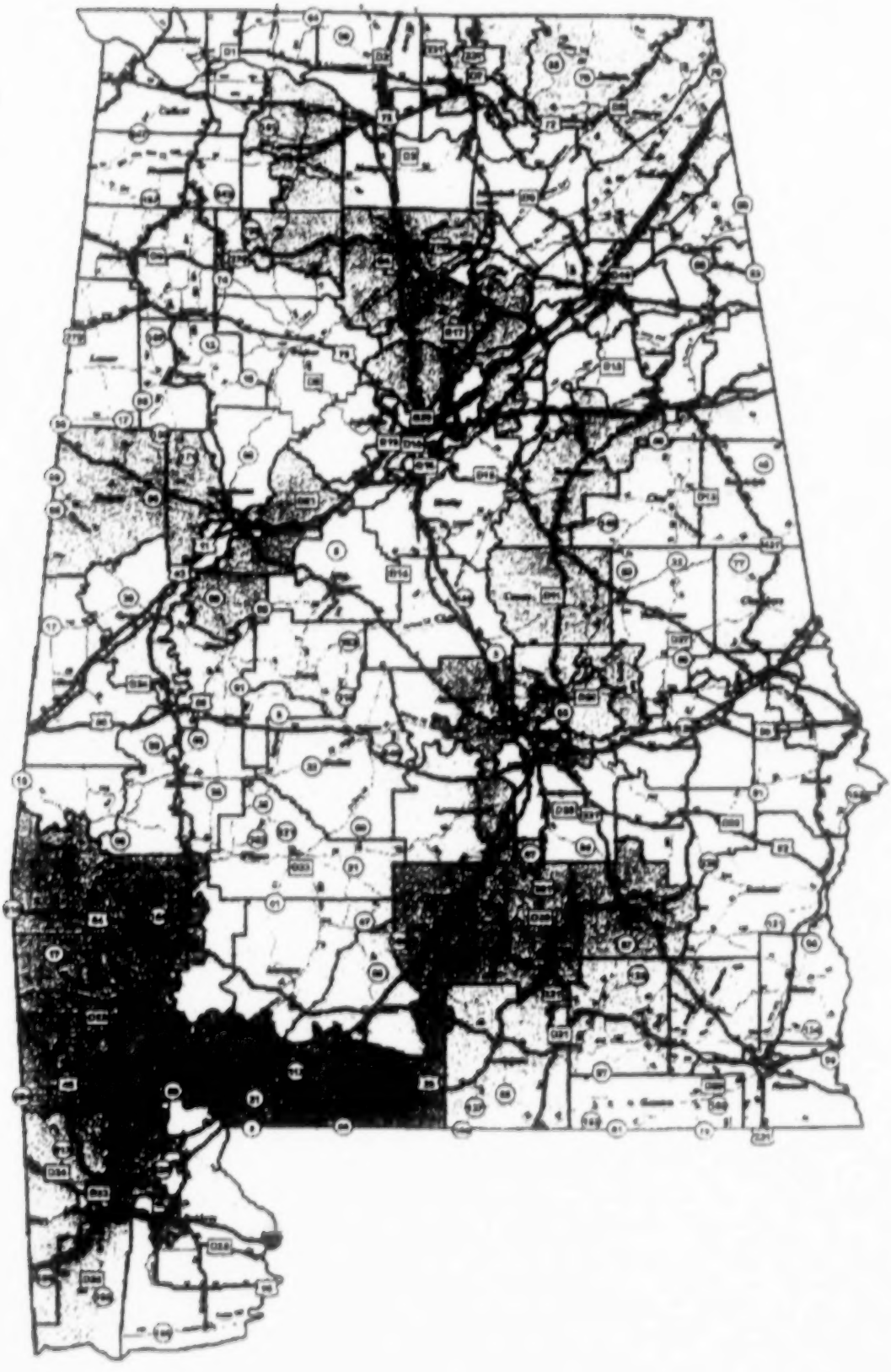
198. In the 2012 House plan, Newton Plaintiff Stacey Stallworth will live in HD 77, which is represented by John Knight, an African-American Democrat. Exhibit P-7 at 11, line 20 through 12, line 2.

* * *

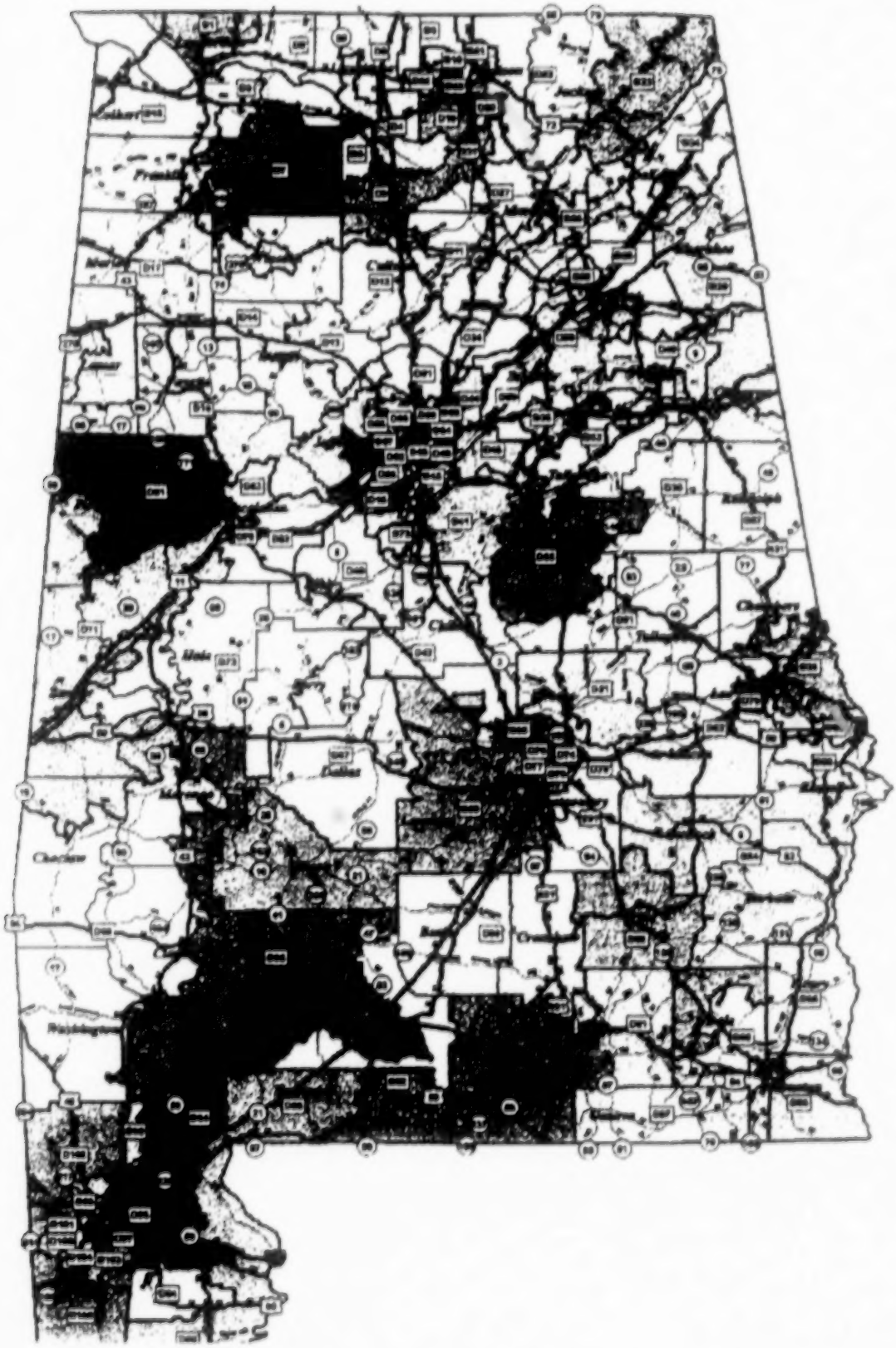
2014 Senate Districts



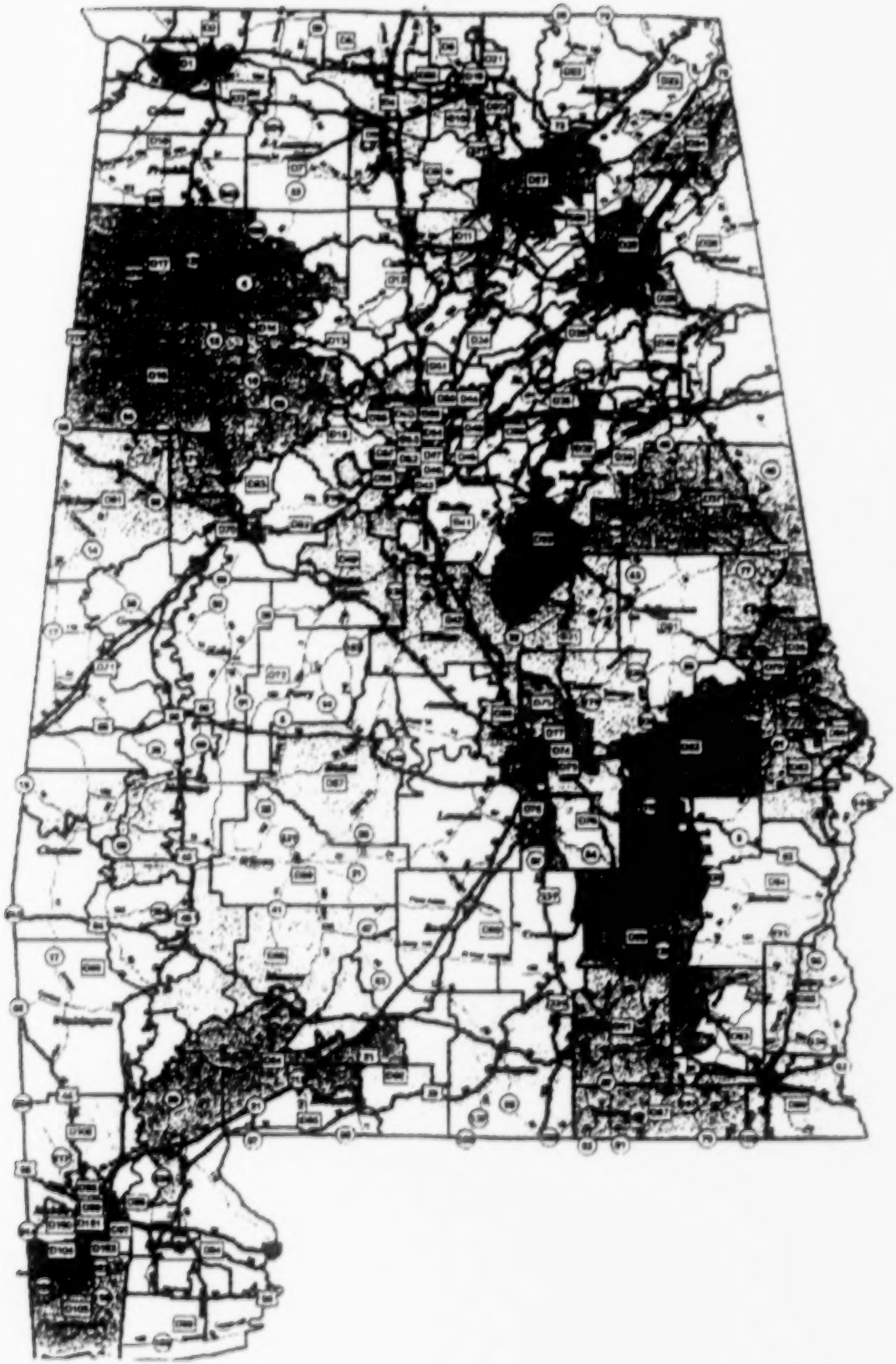
2001 Senate Districts

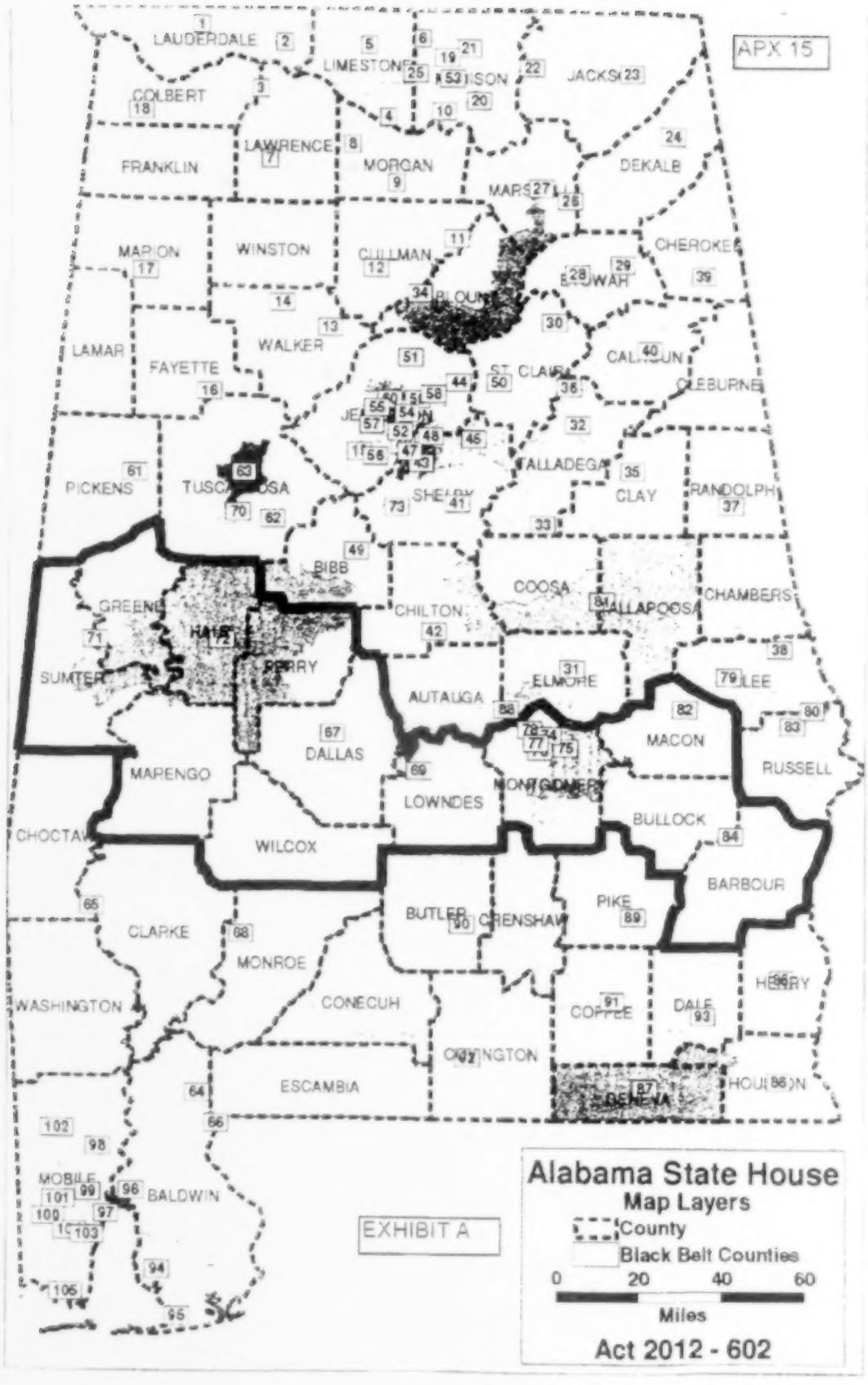


2014 House Districts



2001 House Districts

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MARSHALL
MARION
WINSTON
CULLMAN
CHEROKEE
BLOUNT
LAMAR
FAYETTE
WALKER
ST CLAIR
CALHOUN
CLEBURNE
PICKENS
TUSCALOOSA
SHELBY
TALLADEGA
CLAY
RANDOLPH
BIBB
GREENE
HALE
CHILTON
COOSA
TALLAPOOSA
CHAMBERS
SUMTER
PERRY
AUTAUGA
ELMORE
LEE
MACON
RUSSELL
MARENGO
DALLAS
LOWNDES
MONTGOMERY
BULLOCK
BARBOUR
CHOCTAW
WILCOX
PIKE
BUTLER
CRENSHAW
CLARKE
MONROE
WASHINGTON
CONECUH
COFFEE
DALE
HENRY
COVINGTON
ESCAMBIA
GENEVA
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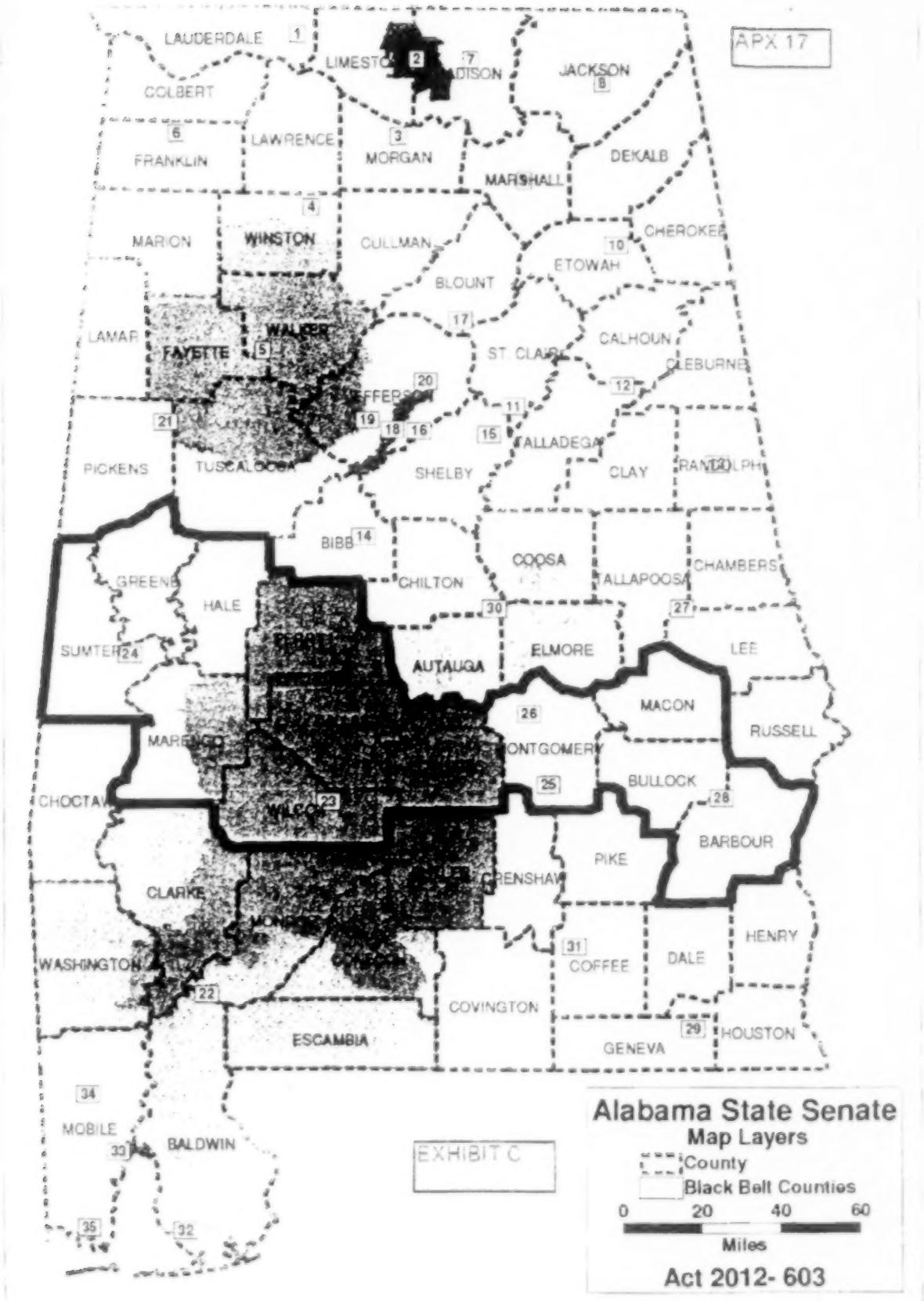
Act 2012 - 602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CHEROKEE
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EXHIBIT C
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Map Layers
County
Black Belt Counties
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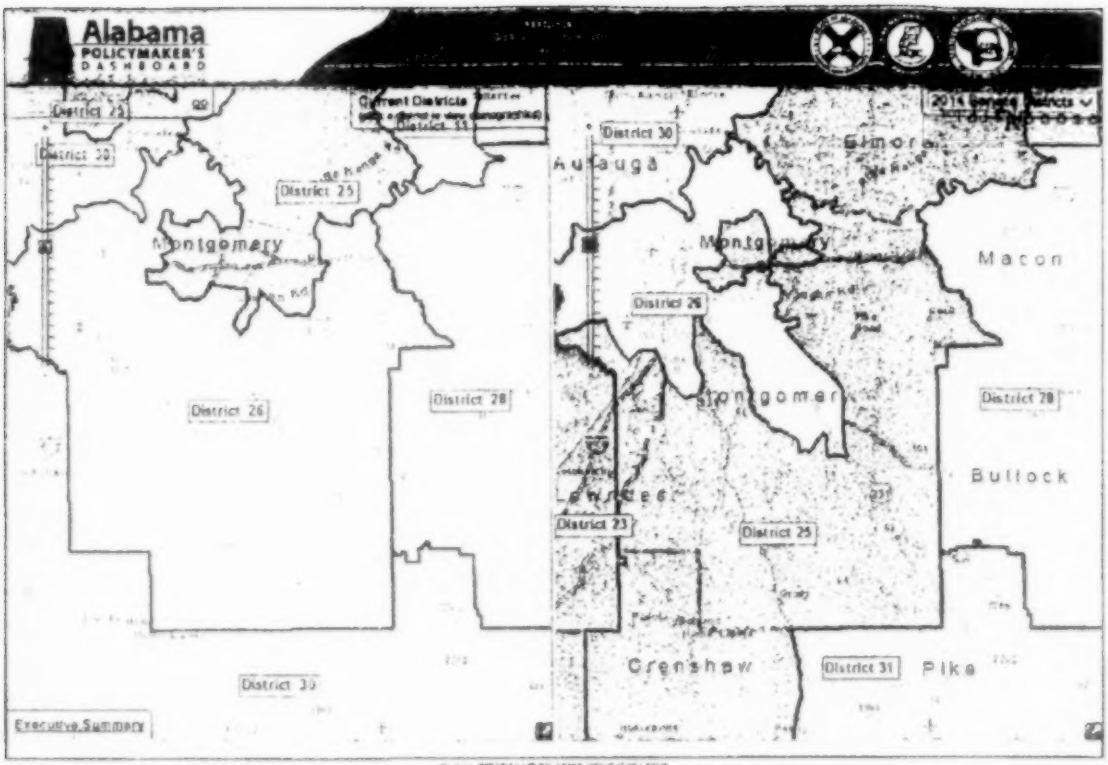
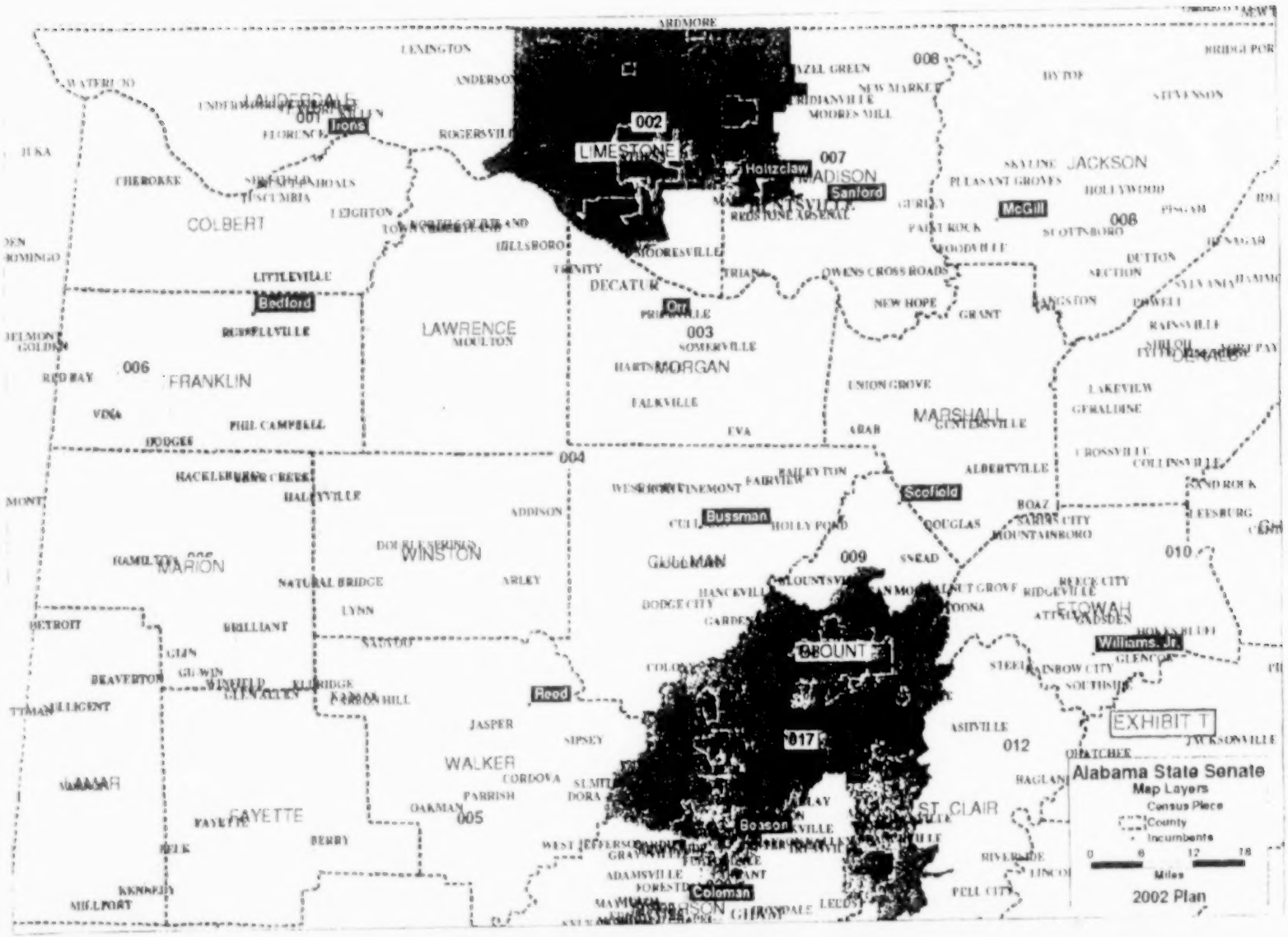
Act 2012- 603



PLAINTIFF'S EXHIBIT NPX-3530

APX 34


Alabama State Senate
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Irons
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Sanford
McGill
Bedford
Orr
Bussman
Scofield
Williams, Jr.
Reed
Boson
Coleman
LIMESTONE
MADISON
JACKSON
COLBERT
LAWRENCE
MORGAN
FRANKLIN
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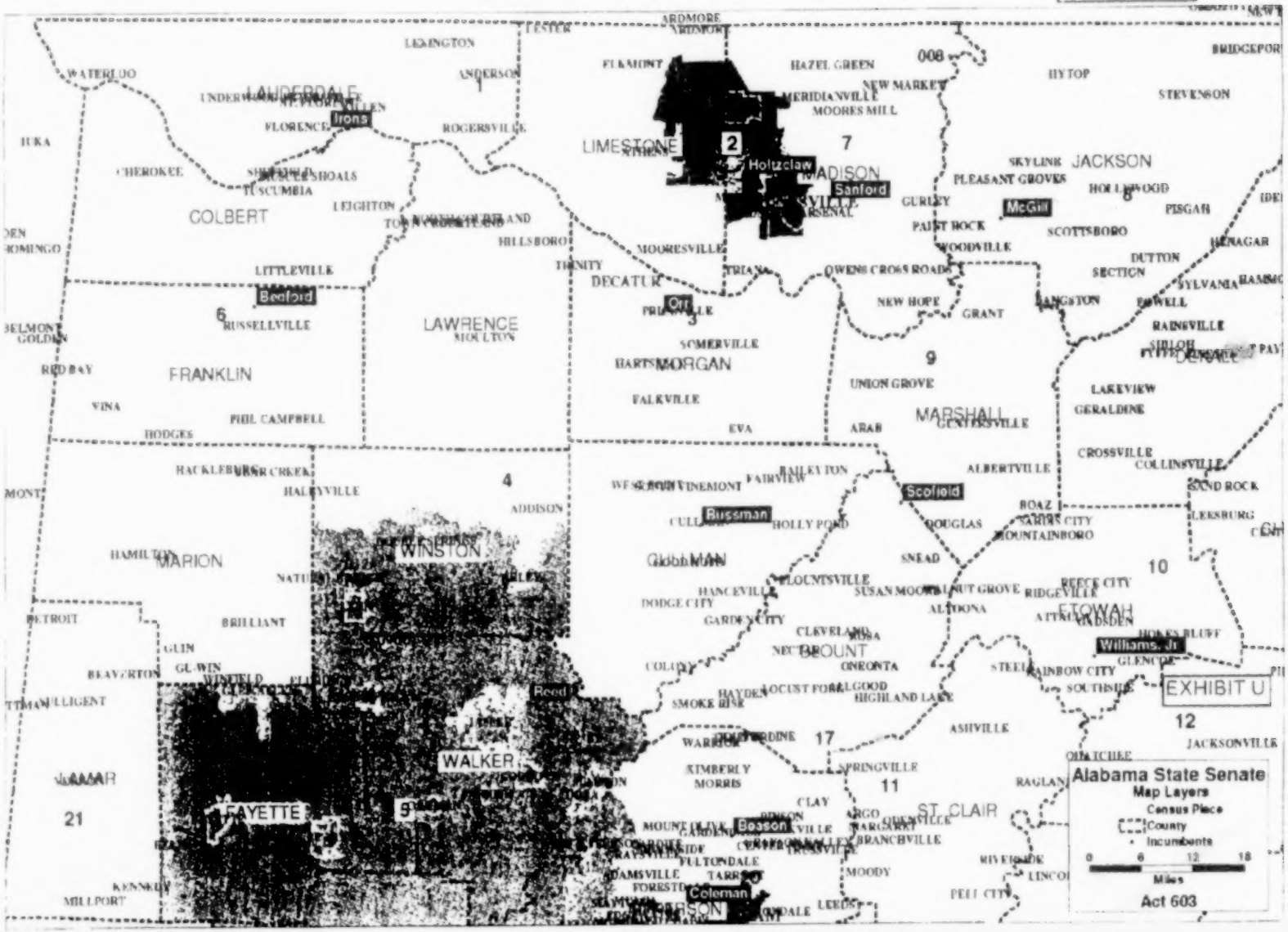
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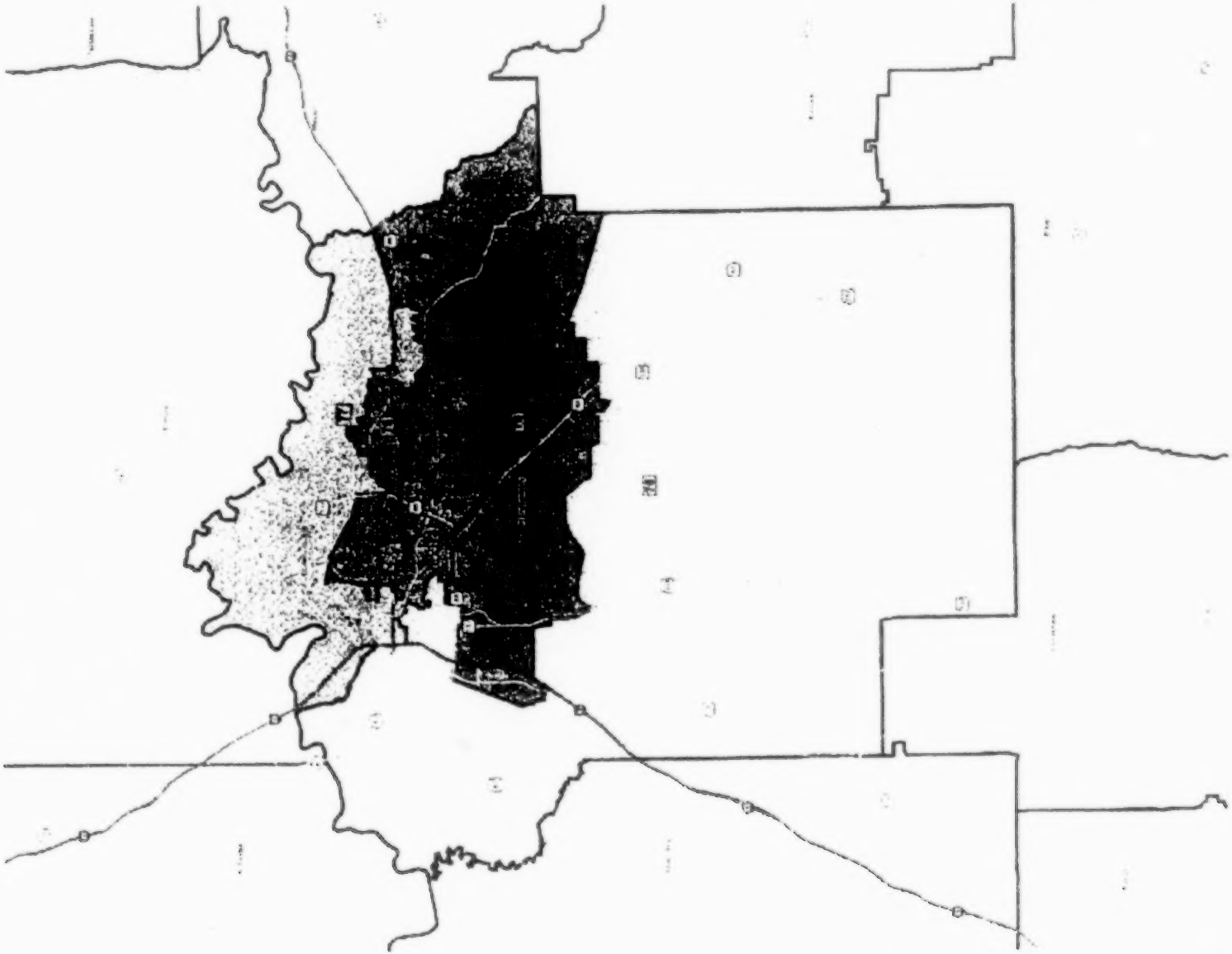

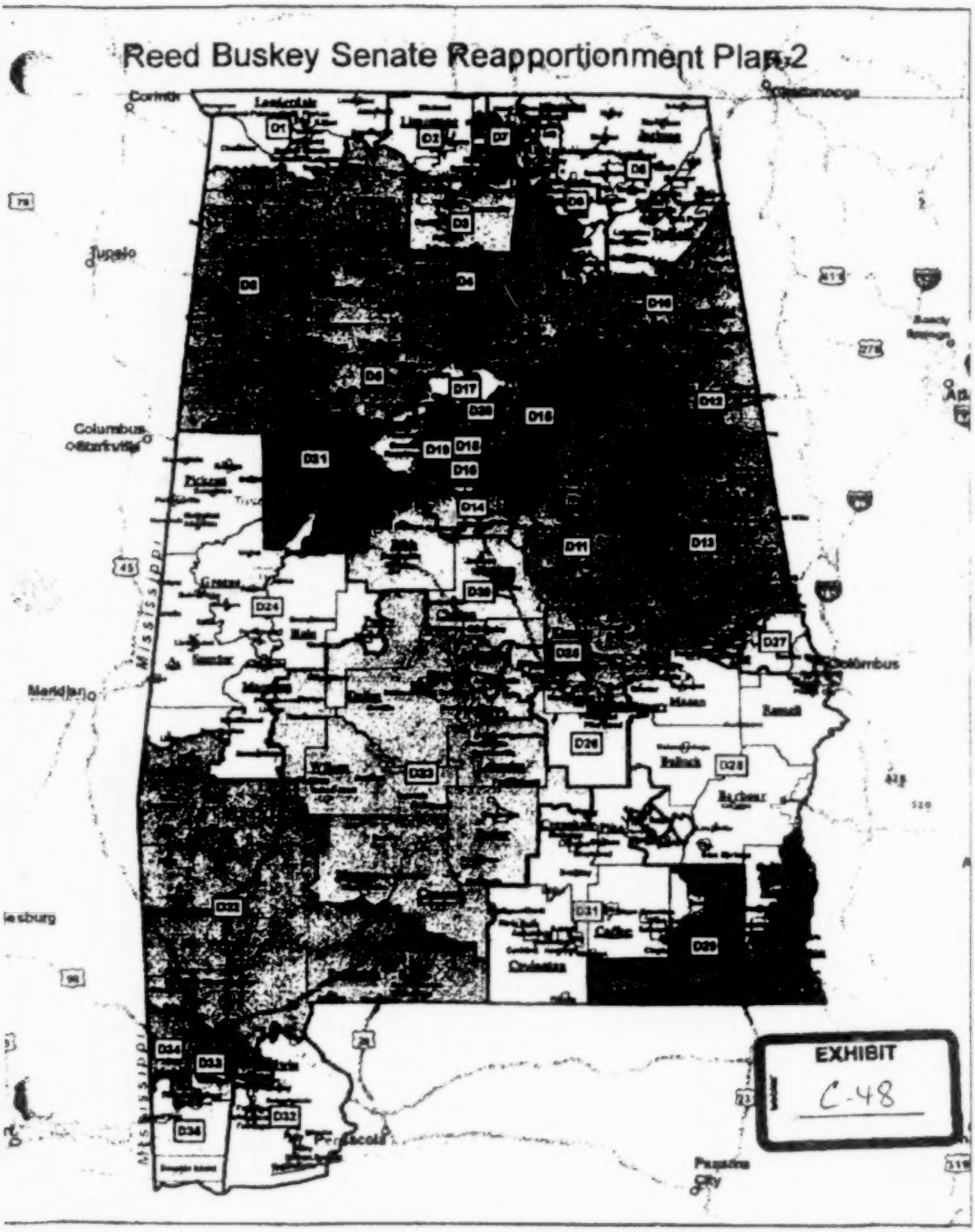
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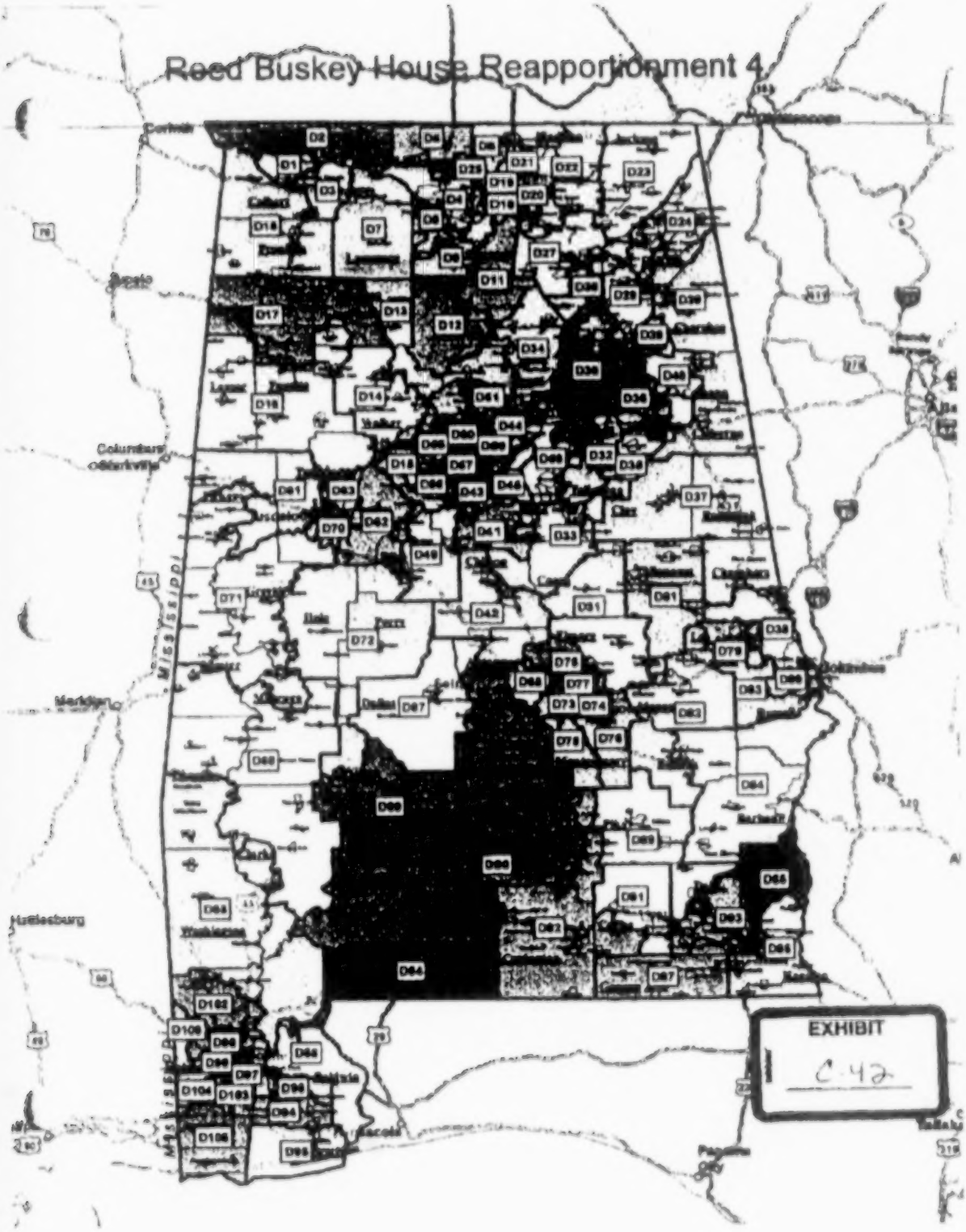
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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, [v.] THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-691 WKW-MHT-WHP
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-1081 WKW-MHT-WHP

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO NEWTON PLAINTIFFS' CLAIMS

(Filed Jun. 17, 2013)

* * *

ARGUMENT

1. The Applicable Standard

In pertinent part, Federal Rule of Civil Procedure 56(a) states, "The court shall enter summary judgment

if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

2. The Alabama Democratic Conference lacks standing to pursue district-specific racial gerrymandering claims.[1]

In *United States v. Hays,* 515 U.S. 737, 115 S. Ct. 2431 (1995), the United States Supreme Court held that, in order to pursue a racial gerrymandering claim, one must live in the district at issue or otherwise show that he or she, personally, has been the subject of an invidious racial classification. The Court reasoned that, without such a showing, the claimant would be asserting only a generalized grievance that is insufficient to create standing. *Id.*, 515 U.S. at 743-45, 115 S. Ct. at 2435-37; see also *Lance v. Coffman,* 549 U.S. 437, 439, 127 S. Ct. 1194, 1996 (2007) (The Court has "consistently held" that a generalized injury is insufficient to create standing.).

Hays applies to the racial gerrymandering claims of the Alabama Democratic Conference. In Count II of their Complaint, the Newton Plaintiffs assert that the 2012 Alabama legislative redistricting plans are

---

[1] The Newton State Defendants note that the State of Alabama has been named as a defendant. That raises serious constitutional questions that this Court can avoid because full relief can be obtained through the official capacity defendant. This Court should dismiss the State as a party defendant for those reasons.

the product of unconstitutional racial gerrymandering. They do not distinguish between and among the individual plaintiffs and the Alabama Democratic Conference, which is characterized as "a statewide political caucus." Newton No. 1 at 4, ¶ 3. As an association, the Alabama Democratic Conference "lives" everywhere and nowhere, so any claim of racial gerrymandering that it makes is, necessarily, a general one that it lacks standing to make.

For that reason, this Court should dismiss the racial gerrymandering claim of the Alabama Democratic Conference.

3. The Newton Plaintiffs lack standing to pursue their challenge to SD 11.

In their Complaint, the Newton Plaintiffs point to, among other things, SD 11 as an alleged product of racial gerrymandering. Newton No. 1 at 16, ¶ 46f. None of the individual Newton Plaintiffs claims to live in SD 11 or alleges a specific injury with respect to SD 11. Accordingly, under *Hays,* the Newton Plaintiffs lack standing to bring this claim, and this Court lacks jurisdiction to consider it. *Davis v. Fed. Election Comm'n,* 554 U.S. 724, 734, 128 S. Ct. 2759, 2679 (2008) (internal citations and quotation marks omitted; alteration by the Court) ("[S]tanding is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought."). This Court should

disregard any suggestion that SD 11 is the product of unconstitutional racial gerrymandering

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, [v.] THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-691 WKW-MHT-WHP
DEMETRIUS NEWTON, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	Case No. 2:12-cv-1081 WKW-MHT-WHP

CONSOLIDATED REPLY BRIEF OF THE *NEWTON* STATE DEFENDANTS, SENATOR GERALD DIAL, AND REPRESENTATIVE JIM McCLENDON TO THE *NEWTON* PLAINTIFFS' RESPONSE

(Filed Jul. 18, 2013)

* * *

The *Newton* Plaintiffs' reliance on associational standing is unsound in this context. In *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333,

343, 97 S. Ct. 2434, 2441 (1977), the Supreme Court noted, "[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." In this case, the claim asserted requires the participation of the individual ADC members. See *United States v. Hays,* 515 U.S. 737, 115 S. Ct. 2431 (1995)

United Food and Commercial Workers Union Local 751 v. Brown Group, 517 U.S. 544, 116 S. Ct. 1529 (1996), is not to the contrary. There, the Supreme Court held that a union could pursue a claim for backpay on behalf of its members under the Worker Adjustment and Retraining Notification Act. The Court resorted to general principles in concluding that the third prong of the associational standing test as asserted in that case was prudential.

No such resort to general principles is warranted in the redistricting context. The Court's decision in *Hays* is a specific holding regarding standing. If associational standing is allowed in this context, *Hays* will be a dead letter.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., **Plaintiffs,** **v.** **THE STATE OF ALABAMA, et al.,** **Defendants.**	**CIVIL ACTION NO. 2:12-cv-691-WKW-MHT-WHP (3-judge court)**
DEMETRIUS NEWTON, et al., **Plaintiffs,** **v.** **THE STATE OF ALABAMA, et al.,** **Defendants.**	**CIVIL ACTION NO. 2:12-cv-1081-WKW-MHT-WHP**

Proposed Findings of Fact and Conclusions of Law

(Filed Aug. 21, 2013)

* * *

29. In order to pursue a racial gerrymandering claim, one must live in the district at issue or otherwise show that he or she, personally, is the subject of an invidious racial classification. *United States v. Hays,* 515 U.S. 737, 115 S. Ct. 2431 (1995). Without

such a showing, the claimant would be asserting only a generalized grievance which is insufficient to create standing.

30. No plaintiff who has suffered an actual, concrete, and particularized injury attributable to SD 11 has appeared. Any claims that relate or pertain in any way to SD 11 should be dismissed with prejudice for that reason.

* * *

ALABAMA LEGISLATURE
PERMANENT JOINT LEGISLATIVE
COMMITTEE ON REAPPORTIONMENT

IN RE: PUBLIC HEARING

MAY 17, 2012

MONTGOMERY, ALABAMA

* * *

[11] SENATOR BEDFORD: Thank you very much, Chairmen, Ladies and Gentlemen, I thank you for bringing these maps to us. The first time y'all came to Fayette for a hearing and you heard that Fayette and Lamar County and Marion County wanted to stay together, you put them in four [12] separate Senate districts. So, they probably would have wiped you out or run you out of town on the rail, one.

Not only do I feel, in all due respect to the chairmen of the committee, that Senate – that Dial Plan Number 2 is racial gerrymandering and the dilution of black vote, but it totally destroys the community of interest in Northwest Alabama in two specific ways:

* * *

[15] UNIDENTIFIED SPEAKER: Hey, Mr. Chairmen, Mr. and Mr. Chairmen. I come up here today to challenge the McClendon and the Dial plan under Section 2 of the Voter's Right Act of 1965, as amended under T-73 and the 14th and 11th Amendments of the Constitution of the United States. These two acts violate the "One-Person, One-Vote" standard

set out and controlled by a Supreme Court case by arbitrarily and unnecessarily splitting the population with deviations so the public is nullified, thereby causing non-compliance for the whole county [16] requirement under the Alabama Constitution. These acts are racially gerrymandering and unnecessarily divide the population deviation and violates the whole county provision of the Alabama Constitution and have both the purpose and effect of minimizing and isolating our African-Americans from influence in the Alabama Legislature.

* * *

[27] REPRESENTATIVE COLEMAN: Thank you to the chairperson, the Committee, I am Representative Merika Coleman from Jefferson County, I just want to reiterate a couple of points. I have a problem with the two plan as it relates to packing and stacking of the African-American vote. What I have seen on many of the [28] redistricting plans, they have between 58 – maybe 52- to 73-percent African-Americans in a particular district, and we just don't need that. That is packing the minority votes in a specific area, where we really want to spread that out and have people of minority being all over the State of Alabama, just not in those African-American districts. So, I have an issue with the packing and stacking.

* * *

APPELLANT'S BRIEF

AMER
RECORDS
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 13 2014
OFFICE OF THE CLERK

No. 13-1138

IN THE

Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, ET AL.
Appellants,
v.
ALABAMA, ET AL.,
Appellees.

On Appeal from the
United States District Court for the
Middle District of Alabama

BRIEF FOR APPELLANTS

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QUESTION PRESENTED

This appeal in a legislative redistricting case presents issues of law in regard to how a state may rely on race in setting district boundaries. It is undisputed that the State of Alabama had, among its chief goals, the idea that when possible it would redraw each majority-black district to have the same percentage of black population as the district would have had using 2010 Census data as applied to the former district lines. This goal, particularly when combined with the new goal of significantly reducing population deviation among districts, led the State to stark racial intentionality in district-drawing, packing more supermajorities of black voters into already-majority-black districts, without regard to whether such efforts were actually necessary in each district to allow black voters to elect candidates of their choice. A divided three-judge district court rejected the challenge to the State's legislative redistricting plans. The question presented is:

a. Whether, as the dissenting judge concluded, this effort amounted to an unconstitutional racial quota and racial gerrymandering that is subject to strict scrutiny and that was not justified by the putative interest of complying with the non-retrogression aspect of Section 5 of the Voting Rights Act?

b. Whether these plaintiffs have standing to bring such a constitutional claim?

PARTIES TO THE PROCEEDING

Appellants, plaintiffs below, are the Alabama Democratic Conference, Framon Weaver, Sr., Stacey Stallworth, Rosa Toussaint, and Lynn Pettway. Rep. Demetrius Newton was also a plaintiff, but is now deceased.

Plaintiffs in a consolidated action, who are appellants in No. 13-895 before this Court, are the Alabama Legislative Black Caucus, Bobby Singleton, the Alabama Association of Black County Officials, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr.

Defendants-Appellees are the State of Alabama, its Governor Robert Bentley, and its Secretary of State Jim Bennett. Also present as appellees are intervenor-defendants Senator Gerald Dial and Representative Jim McClendon.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's rules, appellant states that it has no parent corporation and does not issue stock.

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BRIEF FOR APPELLANTS

Appellants the Alabama Democratic Conference, et al. (collectively, "ADC"), respectfully request that this Court reverse the judgment of the United States District Court for the Middle District of Alabama.

OPINION BELOW

The opinion of the district court is reported at 989 F. Supp. 2d 1227 and is reprinted in the appendix to the jurisdictional statement of No. 13-895 at Alabama Legislative Black Caucus's ("ALBC's") Jurisdictional Statement Appendix ("J.S. App.") 1-277.

JURISDICTION

The three-judge district court issued its judgment on December 20, 2013. Appellant timely filed its Statement as to Jurisdiction on March 14, 2014. This Court noted probable jurisdiction on June 2, 2014, and consolidated this case with No. 13-895. This Court extended the time for appellants to file their opening briefs to and including August 13, 2014. This Court has jurisdiction under 28 U.S.C. § 1253.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions, the Fourteenth Amendment and Section 5 of the Voting Rights Act, are set forth in the addendum to this brief.

INTRODUCTION

For its 2012 state legislative redistrictings, Alabama adopted throughout the State an express race-based targeting policy that resulted in districts with staggeringly high black populations, including many in the 70-77% range. That policy, which controlled the entire redistricting process, required the State to mechanically re-create the black-population percentages ("BPPs") in black-majority districts from one decade to the next. As a result of this "fixed BPPs" policy, 16–20% of the State's black residents were moved by race from white-majority districts into super-concentrated black districts. At the same time, inter-racial political coalitions in integrated districts were decimated, as 70% of the districts with black voting-age populations of 29–50% were eliminated.

Alabama asserts it had no choice but to adopt this policy in order to comply with Section 5 of the Voting Rights Act ("VRA") and to obtain preclearance of its redistricting plans from the Department of Justice ("DOJ"). That is the *only* justification the State has ever offered: federal law made us do it. But Section 5 did not require the State's policy, nor did Alabama have a reasonable, let alone a strong basis, in evidence to believe that it did. The result is election districts extraordinarily segregated by race, but for which *no* level of government claims decision-making responsibility.

Appellants challenge Alabama's race-based statewide redistricting policy, not the design of any one particular election district. Taking the State at its word that it believed federal law tied its hands, the

State dramatically misapprehended its federal obligations, and the Constitution does not permit states to stumble into such excessively-segregated election districts, whether through good faith or bad. Section 5 has never required mechanically re-creating BPPs from one decade to the next. This Court's decisions directly reject that view. DOJ's enforcement guidelines expressly reject that view. And actual DOJ Section 5 practice rejects that view.

Section 5 instead requires non-retrogression, which depends upon whether a state has unjustifiably eliminated districts in which a protected minority had the ability to elect its candidates of choice. Assessing non-retrogression requires a functional analysis of actual voting patterns and related factors. Yet Alabama, by its own admission, did no such analysis here. And the BPPs that Alabama re-created in numerous districts were far in excess of levels that any jurisdiction could reasonably believe functionally necessary to avoid retrogression.

Under any standard of equal protection review, Alabama's redistricting plans, based on a crude race-based policy in an area of exceptional constitutional sensitivity, are unconstitutional.

STATEMENT OF THE CASE

I. Factual Background

Alabama adopted two overarching policies to guide its 2012 statewide legislative redistricting process: (1) a strict interpretation of the "one person one vote" principle that abandoned Alabama's traditional practice of permitting inter-district total population deviations

of up to 10% in favor of a new, self-imposed 2% population-deviation rule, J.S. App. 27; and (2) an equally self-imposed (and legally incorrect) reading of the State's duties under Section 5 of the VRA that, according to Alabama, required the State to re-create from one decade to the next the identical or nearly identical BPPs of all black-majority districts (applying the 2010 Census data to the districts from the prior, 2001 plan). Adopted in advance of the actual map drawing, these two policies provided the constraints within which the redistricting authorities made specific decisions about the design of particular districts.

To illustrate, because Senate District 26 (SD 26) in the 2001 plan had a BPP of 72.75% (using the 2010 Census numbers), the redistricters intentionally designed the new SD 26 to ensure a BPP at least as high as 72.75% (in fact, the 2012 plan increased it to 75.22%). Although this "fixed BPPs" constraint was self-imposed, Alabama officials asserted that Section 5 denied the State any choice in the matter.

In insisting on creating districts with the same BPPs, the State took no factors into account other than raw racial population numbers. As described in detail below, the State did not consider whether its race-based policy of re-creating the identical or nearly identical BPPs from one decade to the next was necessary to ensure that minority voters would continue to have the ability to elect their candidates of choice. Nor, in the State's single-minded focus on meeting its racial-targeting priorities, did it consider whether it was linking communities of shared or divergent interests, socio-economic circumstances,

educational status, or other traits. Instead of exercising its judgment, Alabama asserted that Section 5 compliance required the State to re-create the same BPPs in all ability-to-elect districts.

It is this second policy—the State's claim that federal law imposed a racial straitjacket on the State, forcing its officials to re-create and lock in place BPPs in black-majority districts from one decade to the next—that is at issue here.

A. The State's Policy.

The 2010 Census revealed that in Alabama, the populations of white residents had decreased over the prior decade (from 70.3% to 67%), the black population had remained stable at 26%, and the Hispanic population had increased (from 1.7% to 3.9%). J.S. App. 15-16. The benchmark 2001 plans included eight majority-black population ("ability to elect") Senate districts and twenty-seven such House districts. J.S. App. 4.

The three key actors in the design of the 2012 plans gave uniform and consistent testimony regarding the State's "fixed BPPs" policy for these districts. Two of these figures were the political leaders of the process, the Senate and House co-chairs of the Joint House-Senate Permanent Legislative on Reapportionment Committee ("the Committee"), Senator Dial and Representative McClendon. The third figure, Randy Hinaman, was the political consultant they hired to "coordinate with the Republican leadership of the Legislature" to redraw the district lines for Committee approval. J.S. App. 32.

All three figures provided the same testimony regarding the State's racial-targeting policy. As the court below found, they all believed "that the new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census." J.S. App. 33. This policy was settled upon at the outset of the redistricting process; the State then carried out redistricting quite effectively to meet that overriding constraint. As the court below found, "[t]he final versions of the House and Senate bills preserved the majority-black districts with roughly the same percentages of black population as in the 1993 and 2001 plans." J.S. App. 46.

As the court below also found, the redistricters adopted this policy on the ground that Section 5 required it. J.S. App. 180. All three actors consistently testified that they understood non-retrogression to require that there not be "a significant reduction in the percentage of blacks in the new districts as compared to the 2001 districts with the 2010 [Census] data." J.S. App. 33. This was the sole justification the State offered for its policy: that doing so was necessary to comply with Section 5 and ensure DOJ preclearance.

The Committee co-chairs instructed Hinaman at the start of the process that "the new majority-black districts *should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census.*" J.S. App. 33 (emphasis added); J.A. 70. Hinaman operated according to these instructions. As Hinaman explained, in direct response to a question from the court itself:

> JUDGE THOMPSON: Let me ask you this. How do you define retrogression?
>
> THE WITNESS: I define it, in terms of my work, in two ways: One, not lowering the overall total number of majority African American districts in either plan. . . . *And then looking at 2010 census as applied to 2001 lines, whatever that number was, I tried to be as close to that as possible.*

J.A. 88 (emphasis added).

The plan Hinaman drew, he testified, was designed to recreate the "identical numbers" "by total black percentage" as in the prior districts. J.A. 92.

Meeting these racial targets was the dominant consideration in drawing the black-majority districts. J.A. 88. Hinaman did not look at, or take into account, the actual rates of black political participation in these districts—even though he did take actual rates of political participation into account in the white-majority districts. J.A. 91. Hinaman did not look at, or take into account, actual election-return analysis in black-majority districts to see how they would be likely to perform or to determine what population levels were necessary to protect the minority community's ability to elect candidates of choice. *Id.* He did not look at, or take into account, the socio-economic status of the black people he moved into or out of those districts to see whether he was joining black communities of similar status. J.A. 89. He did not look at, or take into account, educational levels of the black residents he moved around. *Id.* He did not look at, or take into account,

anything that would indicate whether the populations he moved into or out of the black-majority districts had common interests. *Id.* As Hinaman testified:

> Q. Did you – were you aware of any related studies, for example, about variations among the state's black communities in terms of voting or anything else?
>
> A. Well, "anything else" covers a lot of subjects, but I was –
>
> Q. I'll be more specific. How about socioeconomic characteristics such as income, type of employment, educational level achieved?
>
> A. I did not look at those factors.
>
> Q. Attitudes?
>
> A. No, sir.
>
> Q. Did you obtain or already have any information about the black population, variations in the black population in various areas such as Birmingham and Mobile, any differences?
>
> A. Differences in terms of?
>
> Q. Of any of the characteristics I've mentioned: Either voting or education, employment, types of employment.
>
> A. No, sir.

J.A. 89-90.

In focusing on bare numbers of black residents alone, Hinaman was equally explicit that he did not

engage in any functional analysis of how the black-majority districts actually performed, or would be likely to perform, in elections:

> Q. But [you] didn't even look how your black majority districts had performed in any election?
>
> A. I was more concerned in drawing minority districts as to whether I was retrogressing the overall population, black percentage, than voter results.

J.A. 91.

The co-chairs of the Committee gave exactly the same testimony. As the district court found, Senator Dial, the principal drafter of the Senate plan, J.A. 22, understood avoiding retrogression to mean that "we could not in any plan reduce the number of black voters in any district that had been determined to be a majority black district." *Id.* On direct examination, Senator Dial took pride in the fact that the Senate plan met its racial population targets nearly perfectly:

> Q: And that included bringing the African American populations of those districts up to approximately equal as best as you can with what it had been in 2001?
>
> A: Yes. And we were able to accomplish that almost 100 percent.

J.A. 24.

On cross-examination, Senator Dial explained that the policy of re-creating the same (or higher) BPPs took precedence:

> Q: So your testimony is that you really didn't look into the behavior of individual districts. Instead, you simply went by the black – the number of black people, the black percentage in the district, and what you did was try and *at least maintain that or increase it.* Is that your – fair statement of your testimony?
>
> A: That's fair, yes.

J.A. 36-37 (emphasis added). Senator Dial gave similar testimony numerous times. J.A. 22, 24, 29-30, 33-36. Representative McClendon, the Committee co-chair from the House, provided the exact same testimony. J.A. 97-98.

In adopting this statewide "fixed BPPs" policy, the redistricters rejected the public testimony of the Committee majority's own expert counsel, Dorman Walker. At a public redistricting hearing, he advised the Committee that Section 5 did *not* require locking into place fixed BPPs. To the contrary, he stated, Section 5 required the State to engage in a functional analysis of the population levels necessary for the minority community to elect its candidates of choice. Indeed, he testified that the State's mechanical racial targeting policy might well lead DOJ to *refuse* to preclear the plans because they would over-concentrate minority voters into supermajority districts without sufficient justification:

> In the past it used to be 65 or 65 - above 65 . . . I'm pretty sure that if you were to send a district that was 65 percent black to the Department of Justice now, they would wonder

> why you were packing it, and they'll be looking for, my understanding is, much lower levels. I mean a black majority would certainly be above 50, but 55 may be extreme in some cases.

J.A. 175-76.

Once these overall racial targets were in place, the first thing Hinaman did was to design the majority-black districts. J.S. App. 34. As Senator Dial similarly testified:

> [W]e had to increase [majority-minority districts] percentagewise on the same number of minority voters that we had [previously]. And so that created a problem, realizing the whole plan is like a domino. If you change one district, *you effectively change the whole state.* So I began drawing the minority districts and worked out from there. And basically what we had left was basically filling in the blanks with what was left after we did the minority districts.

J.A. 24 (emphasis added).

Before the Committee released its proposed plans to the public, it conducted twenty-one public hearings. J.S. App. 30. Without specific plans to examine, commentators complained that they lacked knowledge of how the design of any district might affect the design of others. Even so, many commentators, including incumbent black legislators, urged the Committee not to "pack" or "race pack[]" black-majority districts. J.A. 169-70, 174. After proposed plans were released, the Committee conducted a single, one-hour public hearing. Appellants, a major political organization mobilizing

minority voters for decades, and its chairman, Dr. Joe Reed, as well as all other witnesses, were permitted three minutes to address the entirety of both plans. J.A. 52. In their limited minutes, many criticized the plans as a "racial gerrymander" that involved "packing and stacking" black residents. J.A. 211-12.

When the final plans were enacted into law, every black member of the State House and Senate voted against them. J.S. App. 209. DOJ, which has no legal authority to deny preclearance based on the constitutional violations at issue in this appeal, precleared the plans and they went into effect. J.S. App. 8.

B. The Implementation and Effects of the State's Policy.

1. Implementation. As Section 5 required, the 2012 plans maintained the same number of black-majority districts as in the prior plans. But under the State's approach, that was not enough. In meeting its new 2% population-equality standard, the State insisted that it was further obligated to re-populate districts in ways that re-created the same BPPs in majority-black districts. That meant the State had to move voters in and out of districts based solely on race, and the State took extraordinary measures to do so.

SD 26, in Montgomery County, provides an example. Under the 2001 plan, this was a majority-black district represented by Senator Quinton Ross. Applying the 2010 Census data, SD 26 was 72.75% black at the time of redistricting. J.A. 107. Under the newly-adopted 2% population-deviation standard, it

was also underpopulated by approximately 16,000 people. *Id.* These additional 16,000 people could have been added to the district by many means.

The redistricters, however, chose an explicit racial means to do so. In searching out populations to fill out the district, the drafters explicitly used race to move black voters into, and white voters out of, the district to increase the district by 16,000 people. They succeeded, with great precision: the new plan added 15,785 people to the district—14,806 of whom were black and only 36 of whom (0.2%) were white (943 were other minorities).[1] In the new plan, SD 26 is now over 75% black—even higher than before. J.A. 107.

Senator Ross testified, without contradiction in the record, that white portions of precincts previously within SD 26 were moved into the adjoining white-majority SD 25, while the black portions of those precincts were retained in SD 26. J.S. App. 202. As the dissent noted, this meant that even though SD 26 needed to *add* a large new population, the redistricters nonetheless moved *out* of the district white residents already living in SD 26. J.S. App. 202.

Moreover, to achieve this level of racially-oriented precision, the redistricters had to go down to the census-block level and split existing election precincts along racial lines. J.A. 87-88. Census-block information (collected house by house) includes racial data for each block, but does not include political data on how voters

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[1] *ALBC v. Alabama*, No. 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. 2013) (ECF No. 30-39); *id.* (ECF No. 30-41).

register or vote. Thus, when using census-block data, the redistricters had only racial-demographic information to draw on and no information about how those blocks actually voted or performed in elections. J.S. App. 205; *see Bush v. Vera*, 517 U.S. 952, 961–62 (1996) (describing differences between ability to sort by race versus political behavior at the census block versus the precinct level). Senator Ross testified that, given the demographics of the area, to add 99.8% minority residents and only 0.2% white residents to SD 26, "You have to make sure you look hard to find them [the additional black residents]." J.A. 46. In ensuring that 99.8% of the people Alabama moved into SD 26 were minority residents—to create a 75% BPP district—Alabama achieved a level of racial line-drawing "perfection" even beyond that in *Gomillion v. Lightfoot*, where Tuskegeee managed to move only 97.5%-99% of its black residents outside of the city. 364 U.S. 339, 341 (1960). To achieve this result, the new SD 26 creatively curls around to exclude a majority-white portion of Montgomery County. J.S. App. 202; J.A. 197.

The redistricters did not attempt to determine the BPP necessary to enable SD 26 to function as an effective ability-to-elect district. As is undisputed and noted in the dissent, if every additional resident of SD 26 needed to fill out the new SD 26 with nearly 16,000 additional voters had been white, the new district would still have been 64.3% black. J.S. App. 201 n.12. That is a black ability-to-elect district everywhere, particularly in Alabama, where black registration and turnout now equals or exceeds that of whites. *See infra* Part I.A.3. At that level, and even at levels as low as

50% black, Senator Ross believed the district would enable the minority community to elect its candidate of choice. J.A. 46. Senator Dial similarly recognized that Senator Ross could no doubt win election in a 64% black district, but Senator Dial nonetheless refused to permit lowering that BPP because, he asserted, Section 5 and the DOJ would not permit it. J.A. 30-31, 36-37.

The court below noted, as SD 26 illustrates, how accurately the redistricters had achieved their purely numerical BPP goals across the State. J.S. App. 47-48. In nearly half of the House and Senate districts, the BPP of the new districts changed by less than 1% of the old.[2] The dissent further illustrated, with undisputed facts, the precise targeting of the State's policy:

> In some districts, the rigidity of these quotas is on full display. HD 52 needed an additional 1,145 black people to meet the quota; the drafters added an additional 1,143. In other words, the drafters came within two individuals of achieving the exact quota they set for the black population, out of a total population of 45,083; those two people represent .004 % of the district. In HD 55, the drafters added 6,994 additional black residents, just 13 individuals more than

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[2] For accurate data comparing the 2001 and the 2012 districts, using 2010 Census data for both, which is the way the State applied its policy, see *ALBC v. Alabama*, No. 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. 2013) (ECF No. 196) at 12-13. The majority below apparently reproduced a different set of tables, at J.S. App.47-48, which list the population of the 2001 districts at the time of the 2000 Census, not the 2010 one.

> the quota required, and in HD 56 they added 2,503 residents, just 12 individuals more than the quota required, both out of a total population of 45,071. In the Senate, SD 23 contains 116 more black individuals than were needed to achieve the drafters' quota of adding an additional 15,069 black people, out of a total population of 135,338; in other words, the difference between the quota and the additional black population in the ultimate plan represents .086 % of the district.

J.S. App. 208-09 (footnote omitted).

If the State slightly missed its racial targets in some areas, that was only because, as Hinaman testified, "[i]n some districts, it was obviously... unavoidable because there was just not the African-American population to enter those districts. The black percentage was going to go down no matter what. So there were certain areas where you couldn't help but lower the percentage."[3] Otherwise, the State met its targets.

2. Effects. Taken together, the State's two, overarching, self-imposed constraints produced legislative redistricting plans that took 16-20% of the State's black residents from white-majority districts and moved them into black-majority districts, many of which were above 65% in BPP. J.S. App. 196.

One effect of the "fixed BPPs" policy was that state officials rejected any plan out of hand that did not meet their racial targets. Senator Dial so testified. J.A. 34-

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[3] *ALBC v. Alabama*, No. 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. 2013) (ECF No. 134-4) at 102; Trial Tr. Vol. III, at 163.

35. The minority, for example, submitted a Senate plan, labeled SB 5, that maintained the same number of ability-to-elect districts with majority black voting age percentages as in the prior plan (eight). Senator Dial testified that the "only reason" he rejected this plan was that it did not maintain the high BPPs those districts previously had. J.A. 34. Even though SB 5 avoided measures like splitting Mobile County between districts, Senator Dial rejected this plan, in favor of one that did split counties like Mobile, solely because of the State's "fixed BPPs" policy. *Id.* Based on the view that Section 5 bound the State in this way, he would not consider any proposal that did not re-create the BPP in each majority-black district.

A second effect of the State's policy was that black residents were necessarily siphoned out of existing or potential inter-racial coalition districts and moved into black-majority districts that were already heavily racially concentrated. The ADC has always sought out and worked with white allies, and endorsed candidates in all races (whether a minority candidate runs or not), because, as its President Dr. Reed testified, "if you don't have white allies you can have – 30 percent of the senate can be black. But if you don't have some white allies, you're not going to pass anything."[4] Yet the number of more integrated Senate districts, with BVAPs between 29% and 50%, went down from four to zero; for the House, that number went down from nine to four. J.A. 103-08. Put in other terms, 70% of these racially integrated districts were eliminated in the

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[4] Trial Tr., Vol. II. at 160-61.

service of the State's "non-retrogression" approach. Senator Dial specifically testified that this meant black voters would lose influence in white-majority districts, but that this was Section 5's fault, not his. J.A. 30.

HD 73 in Montgomery County, for example, was a black-plurality district that in 2010 had elected the candidate of choice of the black community.[5] Pursuant to the State's "fixed BPP" policy, the new plan eliminated that district, in part because its black residents were deemed "necessary" to meet the State's "fixed BPP" goals in black-majority districts. J.S. App. 36-37, 200 n.10.

Coalitions between minority groups were also affected. SDs 11 and 22 provide two examples.[6] SD 11, which had long elected the candidate of choice of minority voters through inter-racial coalitions, was re-shaped by the exchange of a large majority-black portion of Talladega County with a heavily white and growing suburban area of Shelby County. J.A. 90. As a result, the new plan lowered the minority voting age population in SD 11 from 34.2% to 15.3%.[7] In SD 22, a black-Native American coalition had long and dependably elected their candidate of choice from this

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[5] The majority below labeled HD 73 "majority white," J.S. App. 36, but as the dissent correctly noted, the 2010 Census numbers showed that blacks, at 48.44%, outnumbered whites in the district, at 44.07%. J.S. App. 200 n.10.

[6] J.A. 139-142.

[7] *ALBC v. Alabama*, No. 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. 2013) (ECF No. 30-39); *id.* (ECF No. 30-41).

rural area.[8] But the State's plan required dispersing a fifth of SD 22's black population to ensure that the surrounding black-majority districts SD 23 and SD 24 would meet the State's "fixed BPPs" targets.[9]

These are just some examples of the effects that followed from the statewide policy of requiring black-majority districts to be re-created with the same BPPs as in the prior plan, as nearly as practical. Other effects are documented in the ALBC merits brief in No. 13-895 and adopted herein by reference.

II. Proceedings Below.

The ADC was founded in 1960 by, among others, Dr. Gomillion, the lead plaintiff in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The ADC was created for the purpose of advancing the political aspirations of Alabama's black residents. J.S. App. 76. Along with five named individuals, the ADC brought suit under Section 2 of the VRA and the Fourteenth and Fifteenth Amendments, alleging that the State's legislative redistricting plans constituted illegal racial gerrymanders.

Before the ADC complaint was filed, the ALBC plaintiffs (appellants in No. 13-895), had brought suit also challenging Alabama's 2012 plans on VRA and constitutional grounds. The ADC suit was assigned to

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[8] Trial Tr., Vol. IV at 38-50.

[9] *ALBC v. Alabama*, No. 2:12-cv-00691-WKW-MHT-WHP (M.D. Ala. 2013) (ECF No. 30-39); *id.* (ECF No. 30-41); Trial Transcript Vol. IV, at 44-46.

the same three-judge district court, which consolidated the cases. After a bench trial, the district court: (1) dismissed the ADC appellants' constitutional claims for lack of standing and (2) rejected those claims on the merits in any event and also rejected ADC's claims under the VRA.

The 2-1 majority in the district court found that the ADC did not have standing on a basis the State had never raised, but which the majority raised for the first time, *sua sponte*, in its final opinion on the merits.

This appeal followed. This Court noted probable jurisdiction over Question 1 in this appeal and Question 2 in No. 13-895, consolidated the cases, but did not summarily affirm with respect to the other questions presented.

SUMMARY OF ARGUMENT

This Court should invalidate Alabama's redistricting plans, and free Alabama from its misapprehension about what federal law requires, on either of two grounds.

First, under any standard of equal protection review, Alabama's racial-classification policy lacks a legitimate, non-arbitrary justification. No heavy constitutional lifting is required for that conclusion. Because Alabama's policy is based on the view that federal law required it to do something that federal law did not require (nor could be reasonably understood to require), the State's policy is left without any justification at all. Such a policy is, virtually by definition, unconstitutionally arbitrary. That Alabama's policy operates in an area of exceptional

constitutional sensitivity—the appropriate role of race in the design of democratic institutions—makes that policy's failure to rest on a legitimate, reasoned foundation all the more problematic.[10]

Second, even if Alabama's policy survives minimal constitutional scrutiny, it cannot survive strict scrutiny. Alabama employed an express racial classification that triggers strict-scrutiny review. Because Section 5 does not require mechanically re-creating BPPs from one decade to the next, untethered to any functional retrogression analysis, Alabama's policy is not narrowly tailored.

On either ground, Alabama's redistricting plans are unconstitutional. The ADC appellants have standing to make these claims. The district court *sua sponte* rejected the ADC appellants' standing based on grounds never briefed or argued below. Had the issue been raised at any time before final decision, the ADC could have simply filed an affidavit providing the information the majority below perceived necessary to establish standing. Regardless, the majority failed to recognize the undisputed fact that some named individual ADC plaintiffs, such as Stacey Stallworth, live in majority-black districts, drawn under the policy

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[10] Alabama's 2012 redistricting took place prior to this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and the Court need not address whether Section 5 compliance can continue to provide an adequate justification for that 2012 redistricting post-*Shelby County*. Even assuming it can, Alabama lacked an adequate basis in evidence for its position that Section 5 required the policy at issue here.

challenged here, and thus have standing on any view. The ADC appellants also established several other bases on which to raise their claims.

ARGUMENT

I. Alabama's Express "Fixed BPPs" Policy Cannot Survive Any Level of Equal Protection Scrutiny, Let Alone Strict Scrutiny.

Alabama's policy is virtually the definition of an unjustified governmental race-based classification. Alabama's purported need to comply with federal law cannot provide a legitimate or reasoned justification for Alabama's policy when federal law clearly does *not* require such a policy, nor was there any reasonable or strong basis in evidence to believe that it did.

Under any standard of review, the State's race-based policy is unconstitutional unless it at least serves an actual governmental interest. Compliance with the imagined requirements of federal law, when no reasonable or strong basis in evidence exists for that imagined view, cannot provide that justification.

The Court has already recognized this principle, even as a matter of statutory interpretation. In *Ricci v. DeStefano*, 557 U.S. 557, 583-84 (2009), this Court held that regulated entities must have a strong basis in evidence for race-based policies justified only by the claim that they are necessary to comply with federal anti-discrimination laws, such as Title VII. *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (under the Fourteenth Amendment). The bare minimum requirement of the Equal Protection Clause

must similarly be that a race-based policy have that same adequate and legitimate-justification.

That requirement is all the more important in the area of race and redistricting, for the Constitution explicitly vests States with the "primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). This Court has recognized that "[e]lectoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Highly-charged judgments involving fair political representation must be made under the competing federal mandates to avoid retrogression while simultaneously avoiding the excessive use of race. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"). Yet here, by its own account, Alabama made no independent judgment at all. Ceding its constitutional power to design its democratic institutions, the State believed it had no discretion, nor any responsibility, for the results. The "rational, civic discourse" to forge political judgment on these difficult issues that this Court emphasized in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014), was silenced, and for no good reason. The Constitution's structural commitment to state judgment in this area is ill-served when states abandon their constitutional role based on misapprehensions about federal law constraints.

Indeed, a central purpose of this Court's federalism decisions is to ensure democratic accountability of both

national and state elected officials. *See, e.g., New York v. United States*, 505 U.S. 144 (1992). That accountability is not just diminished, but destroyed, if Alabama claims, even in good faith, that "federal law made us do it"—when federal law did not—in an area as charged as racial redistricting. Federal law did not compel Alabama's race-based policy, yet Alabama disclaims any choice in the matter. A worse way to make policy in such a constitutionally sensitive area is difficult to imagine. Here *no* level of government claims to be responsible for Alabama's race-based districting policy. To preserve appropriate democratic accountability, it is essential for the Court to ensure—whether under minimal scrutiny or somewhat heightened scrutiny appropriate in this constitutionally sensitive context—that Alabama have at least a legitimate, actual justification for its policy. Alabama does not.

To the extent there is any doubt about that, Alabama's policy triggers strict scrutiny, as Part I.B demonstrates. The policy is not narrowly tailored to comply with Section 5 and, for that reason as well, is unconstitutional.

A. Alabama's Racial-Targeting Policy Lacks A Legitimate Justification.

Alabama fundamentally misapprehended its obligations under Section 5. The reasons why are immaterial. As this Court and DOJ enforcement practice have long made clear, Section 5 did not require the State's racial-targeting policy, nor did Alabama have a reasonable basis in evidence, let alone a strong one, for believing so.

1. Section 5 Has Never Required Mechanically Recreating BPPs.

For many decades, this Court's decision in *Beer v. United States*, 425 U.S. 130 (1976) has governed interpretation of Section 5's requirements. *Beer* concluded that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their *effective exercise* of the electoral franchise." *Id.* at 141 (emphasis added). This non-retrogression standard in the ability to elect candidates of choice has defined Section 5's requirements ever since. The "only 'effect'" that violates Section 5 is a retrogressive one; any change not retrogressive in fact does not violate Section 5. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 486-87 (1997) (citing *Beer*). Put in other terms, if a plan does "not increase the degree of discrimination against [protected minorities], it [is] entitled to § 5 preclearance." *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983).

a. Section 5 Has Always Applied a Functional Definition of Retrogression.

To determine whether a change in voting practices is actually retrogressive, neither the courts nor DOJ look to any one demographic factor in isolation. Indeed, courts and DOJ expressly reject doing so. Instead, "a court or the Department of Justice should assess the totality of circumstances in determining retrogression under § 5." *Georgia v. Ashcroft*, 539 U.S. 461, 484-85

(2003) (citations omitted).[11] "No single statistic provides courts with a shortcut to determine whether" a redistricting plan violates the VRA. *Johnson* v. *De Grandy*, 512 U.S. 997, 1020-21 (1994). Consistent with this Court's decisions, DOJ also has long understood the non-retrogression standard to require a highly specific, functional analysis of how election districts are likely to perform in the new plan as compared to the benchmark plan—rather than any formulaic or mechanical "fixed demographic" approach. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) ("DOJ Guidance"). In its guidance document for the most recent redistricting cycle, DOJ made clear that "the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment," but instead engages in a functional analysis. *Id.*

In assessing redistricting plans, DOJ looks at the number of ability-to-elect districts in the benchmark plan and ensures that number has not decreased without sufficient justification in the new plan. *See id.* Moreover, DOJ is explicit that the "ability to elect either exists or it does not in any particular circumstance." *Id.* Under DOJ's guidelines, Section 5 does not prohibit reducing a 75% black-majority district

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[11] In amending the VRA in 2006, Congress rejected this Court's view in *Georgia v. Ashcroft* that "influence" districts could substitute for ability-to-elect districts, but Congress did not reject the longstanding view that retrogression requires a totality-of-the-circumstances analysis.

to a 55% one as long as the minority's ability to elect its candidate of choice remains protected. *See id.*

Similarly, the specialized court in Washington, D.C. that Congress designated for judicial, rather than administrative, preclearance has also recognized the need for a "totality of circumstances" analysis to determine whether a proposed change has a prohibited retrogressive effect. *See Texas v. United States*, 887 F. Supp. 2d 133, 150 (D.D.C. 2012) (noting that "[t]here is no single, clearly defined metric to determine when a minority group has an ability to elect"), *vacated and remanded*, 133 S. Ct. 2885 (2013) (remanding for further consideration in light of *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013)). Other three-judge courts have consistently reached the same conclusion. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, No. CV-12-894, 2014 U.S. Dist. LEXIS 59227, at *8-9 (D. Ariz. Apr. 29, 2014); *Perez v. Perry*, 891 F. Supp. 2d 808, 815 (W.D. Tex. 2012).

b. Section 5 Specifically Permits Reductions in BPPs That Will Not Cause Retrogression in Ability to Elect.

Section 5 has never imposed a zero-tolerance policy for mere reduction of BPPs in ability-to-elect districts. The functional analysis employed specifically permits jurisdictions to reduce BPPs in ability-to-elect districts if doing so will not have an actual retrogressive effect. This Court and DOJ have been clear about that for years.

In *Georgia v. Ashcroft*, for example, every Justice of this Court recognized that mere reductions in BPPs are

not in themselves retrogressive. Indeed, every Justice thought this proposition so obvious as to be without dispute, though the Court divided on more complex questions. As Justice Souter's dissent noted: "The District Court began with the acknowledgement (to which we would all assent) that the simple fact of a decrease in black voting age population (BVAP) in some districts is not alone dispositive about whether a proposed plan is retrogressive." 539 U.S. at 498 (Souter, J., dissenting). To underscore how strongly the dissent agreed with the majority that reducing BPPs cannot be treated as retrogressive in itself, the dissent approvingly quoted the D.C. preclearance court on this point three separate times. *See, e.g., id.* at 499 (Souter, J., dissenting) ("The mere fact that BVAP decreases in certain districts is not enough to deny preclearance." (quotation marks omitted)). Indeed, the district court in *Georgia v. Ashcroft* itself had approved *three* redistricting plans that all included decreases in BVAP in particular districts—and none of those approvals was at issue. *Id.* at 499 n.2 (Souter, J., dissenting).

DOJ practice also should have made clear to Alabama that non-retrogression did not require the State to mechanically preserve BPPs. Even back in the 2000 round of redistricting—well before Alabama's 2012 efforts—DOJ precleared several plans in which states had reduced BPPs, including when states changed majority-black districts into non-majority districts. Such changes are not retrogressive as long as the new districts will still function as effective ability-to-elect districts.

For South Carolina, DOJ precleared Senate maps in 2003 despite reductions in BVAP in nearly all districts with a majority or near-majority black population.[12] For North Carolina that same year, DOJ precleared plans that reduced BPPs in nearly *all* House and Senate districts.[13] Indeed, the benchmark Senate map had three districts with a majority BVAP, but the precleared map had none, with the highest BVAP in District 4, at 49.14%.[14] Similarly, the House had thirteen majority BVAP districts in the benchmark map, but only nine in the 2003 precleared map.[15] For

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[12] *See* Preclearance Submission for the 2003 South Carolina Senate Redistricting Plan by the Senate of South Carolina, June 27, 2003, at 6, *available at* http://www.scstatehouse.gov/redist/senate/Submission%20Letter%20dated%20June%2027,%2003.pdf.

[13] *See* DOJ, Status of Statewide Redistricting Plans, *available at*, http://web.archive.org/web/20100829034045/http://www.justice.gov/crt/voting/sec_5/statewides.php.

[14] *Compare* 2003 Senate Redistricting Plan, Voting Age Population by Race & Ethnicity, *available at* http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2003.asp?Plan=2003_Senate_Redistricting_Plan&Body=Senate, *with* 1992 Senate Base Plan 6, Voting Age Population, *available at* http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_1991.asp?Plan=1992_Senate_Base_Plan_6&Body=Senate.

[15] *Compare* 2003 House Redistricting Plan, Voting Age Population by Race & Ethnicity, *available at* http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2003.asp?Plan=House_Redistricting_Plan&Body=House, *with* 1992 House Base Plan 5, Voting Age Population, *available at*

Alaska, DOJ precleared plans in 2002 despite the reduction in Alaska Native VAP in both a Senate and a House district.[16]

When similarly faced with this issue in the current redistricting cycle following the 2010 Census, DOJ again precleared plans that reduced BPPs after a functional analysis determined these reductions did not compromise the ability to elect. In 2011, DOJ precleared Virginia's Senate plan, despite the fact that it reduced BVAP in all five ability-to-elect districts.[17] DOJ also precleared South Carolina's Senate plan despite BVAP reductions in several ability-to-elect districts.[18] For Alaska, in 2011 DOJ precleared a plan

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http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_1991.asp?Plan=1992_House_Base_Plan_5&Body=House.

[16] Senate District C fell from 47.23% Alaska Native VAP to 46.17% Alaska Native VAP, while House District 6 fell from 56.35% Alaska Native VAP to 54.53% Alaska Native VAP. *See* Submission Under Section 5 of the Voting Rights Act, State of Alaska, Amended Final Redistricting Plan, Request for Expedited Consideration, April 25, 2002, at 4, *available at* http://www.akredistricting.org/Files/Amended%20Final%20Plan/Pre-Clearance%20Letter.pdf.

[17] *See* DOJ, Status of Statewide Redistricting Plans, *available at* http://www.justice.gov/crt/about/vot/sec_5/statewides.php.

[18] *See* South Carolina Senate Preclearance Submission, July 27, 2011, at 6-8, *available at* http://redistricting.scsenate.gov/Cover%20Letter/SC%20Senate%20%20Preclearance%20Cover%20Letter.pdf; Letter of Thomas E. Perez, Assistant Attorney General to Hon. Glenn F. McConnell, Nov. 14 2011, *available at* http://redistricting.scsenate.gov/SenatePlanDOJPreClearLtr2011.pdf.

that reduced the Alaska Native VAP from 58.32% to 46.85% because a functional analysis showed that districts greater than 41.8% Native population would afford the ability to elect.[19]

As these examples amply attest, Alabama had no reasonable basis—let alone a strong basis in evidence—for uncertainty about whether Section 5 or DOJ would permit reductions in BPPs in *any districts at all*, including significant reductions, as long as those changes did not function to eliminate an ability-to-elect district. That is all the more obvious given the extremely high BPPs involved in Alabama's 2012 districts, with BPPs in the House as high as 76.8%, 73.9%, 73.6%, 73.0%, 70.2%, 69.2% (HDs 59, 76, 55, 58, 78, 67, respectively) and in the Senate as high as 75.22% or 71.1% (SDs 26 and 33). J.S. App. 47-48. DOJ does, of course, object at times when jurisdictions reduce BPPs,

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[19] *See* Preclearance Submission of the 2011 Alaska State House and Senate Redistricting Plan by the Alaska Redistricting Board Under Section 5 of the Voting Rights Act, August 9, 2011, at 8, *available at* http://www.akredistricting.org/dojsubmission/August%2011,%202011%20Submission/Volume%2001/Folder%2002%20-%20Submission%20Statement/Submission%20Statement.pdf(Exh. A); Lisa Handley, A Voting Rights Analysis of the Alaska Amended Proclamation State Legislative Plan, May 25, 2015, at 6, 15 at 6, 15, *available at* http://www.akredistricting.org/dojsubmission/May%2025,%202012%20Submission/Volume%2010/Folder%2004%20-%20Report%20of%20Dr.%20Lisa%20Handley/Dr.%20Handley%27s%20Report.pdf. For DOJ's preclearance letter, *see* Letter of Thomas E. Perez, Assistant Attorney General to Michael D. White, Oct. 11, 2011, *available at* http://www.akredistricting.org/Files/PreclearanceLetter_10-11-2011.pdf.

but only when the totality of the circumstances indicates the change will actually be retrogressive.[20]

2. Had Alabama Performed Any Functional Analysis at All, It Would Have Recognized that Non-Retrogression Hardly Required Re-Creating Such Excessively High BPPs.

Alabama's policy was to re-create BPPs everywhere, in all districts, regardless of how high those BPPs were. Had Alabama performed any functional analysis, it quickly would have recognized that maintaining ability-to-elect districts did not require recreating BPPs at such extraordinarily high levels. Senator Dial acknowledged, for example, the 75.2% supermajority in SD 26 was not necessary to ensure ability to elect—yet he required it to have that level nonetheless. J.A. 36. Indeed, even without employing a statistical expert, all the State had to do was look at its own recent elections. All majority-black districts at all population levels were electing the

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[20] Alabama cites one such objection letter. *See* Motion to Dismiss or Affirm at 8. The State leaves out, however, that DOJ did not object to the mere reduction in BPPs, but because two critical factors made the reduction functionally retrogressive. One was that the county had to move some people out of the district to meet its population-equality standard, but had moved far more people out than required; as a result, the district went from the most overpopulated to the most underpopulated. Most importantly, the areas moved out were those from which the minority-preferred candidate in prior elections had received the most support. For that reason and another, DOJ found the change retrogressive. For DOJ's objection letter, *see* http://www.justice.gov/crt/records/vot/obj_letters/letters/VA/l_020709.php.

minority community's candidate of choice. Indeed, under the existing 2001 plan (with the 2010 Census data), three House districts with even *less* than 50% BVAP were electing candidates of choice. The BVAPs of HD 73, 84, and 85 were, respectively, 46.0%, 49.7%, and 46.1%. J.A. 147. Even in the most recent 2010 elections (a landslide for Republicans nationally and in Alabama), the latter two districts elected black office-holders and the first elected a white candidate of choice of the minority community. J.A. 140-41, 144.

Because the State did not perform any functional analysis at all, this is not a case that requires second-guessing the State's (non)judgment. Nor does the case require determining what the appropriate BPPs might be in Alabama generally or in specific areas. Alabama's policy is *different in kind* from one involving a reasonable, good-faith State effort to determine the BPPs necessary to ensure non-retrogression. Here, Alabama simply failed to take into account at all the one single factor—whether districts will function as ability-to-elect districts—most central to assessing retrogression. Instead, Alabama's BPP-targeting policy relied *at every point* on exactly the "predetermined or fixed demographic percentages" that DOJ has made clear are neither required nor appropriate. DOJ Guidance, 76 Fed. Reg. at 7471. In addition, the mechanical rule Alabama adopted does not happen, by accident, to correlate in any reasonable way with the BPPs functionally necessary in fact. No reasonable basis exists, let alone a strong basis in evidence, for the view that Section 5 or DOJ preclearance requires districts with BPPs of 76.8%,

73.9%, 73.6%, 73.0%, 70.2%, and 69.2% (in the House) and 75.22% or 71.1% (in the Senate). J.S. App. 47-48.

Though this evidence is not necessary to find the State's policy unconstitutional, plaintiffs at trial submitted an expert report from Dr. Allan Lichtman, a frequent social-science expert in voting-rights cases. Dr. Lichtman examined the kind of evidence, such as actual voting patterns, that the State had not and concluded that in Alabama, the "very high degree of black political cohesion combined with white crossover [voting] demonstrates that it is not necessary to draw supermajority African American districts to provide African Americans a reasonable opportunity to elect candidates of choice to the state legislature." J.A. 143.[21] The ADC also produced illustrative district maps with BPPs ranging from 48.4% to 55.7% in several counties and Dr. Lichtman found that these districts would provide an "excellent opportunity to elect candidates of [the black community's] choice." *Id.* This analysis was consistent with Dr. Lichtman's findings regarding opportunities for African-American communities to elect candidates of choice in districts with 50% BVAP or even lower in Alabama and other states. J.A. 144. The court below did not question Dr. Lichtman's testimony on any of these points.

Jurisdictions need not attain perfection, of course, in complying with Section 5. No one argues that there is

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[21] The mean level of black support for white and black Democratic candidates was in the low 90% range; the mean level of white support was 29% for white Democrats and 19% for black Democrats. J.A. 126.

some optimal BPP that Alabama was required to reach—anything below which would constitute retrogression and anything above which would be an unconstitutionally excessive use of race. As the Court has recognized, jurisdictions must have "a limited degree of leeway" in determining what is required to comply with Section 5. *Vera*, 517 U.S. at 977. But that leeway is "limited." A mechanical racial-population targeting policy that ignores actual election-district performance, particularly when it produces BPPs of the magnitudes involved here, is beyond any "limited leeway" the State possesses.

When a state takes *all* the considerations relevant under Section 5 into account, and generates a reasonable plan well-grounded in the actual evidence to ensure non-retrogression, the state properly has "limited leeway." Just as VRA districts have to be "reasonably compact," not optimally compact, *Shaw I*, 509 U.S. at 657, the same is true here: Alabama had some leeway to develop reasonable plans properly based in evidence to comply with Section 5. But Alabama did not have leeway to adopt a mechanical "fixed BPPs" policy not tied in any way to what federal law, reasonably understood, requires. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 793 (2007) (Kennedy, J., concurring) (condemning use of "mechanical formula" where racial classifications are employed).

"[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."

Miller, 515 U.S. at 921. Section 5 cannot, of course, justify a State's action "if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655; *see also Vera*, 517 U.S. at 997 (Kennedy, J., concurring) (when a state invokes the VRA, "it still must tailor its districts narrowly to serve that interest"). Rigidly perpetuating BPPs at extremely high levels, with no determination that doing so was functionally required—indeed, where doing so was transparently *not* required—is far from "reasonably necessary."

3. The Majority Below Misinterpreted Section 5's Requirements.

In upholding the State's legislative redistricting plans, the majority below expressed a fundamentally incorrect understanding of Section 5 and the Constitution.

First, the court concluded that Alabama "chose the *only option available*" to the State to comply with Section 5. J.S. App. 181 (emphasis added). In the court's view, if Alabama had reduced BBPs, it would have "by definition" violated Section 5. *Id.*

As already demonstrated, that extreme position is inconsistent with this Court's precedents and DOJ's enforcement practices. Citing neither source, the majority relied for this rigid view only on its own interpretation of the 2006 amendments to the VRA. J.S. App. at 176-81. But no court or DOJ decision supports the majority's misunderstanding of those amendments.

Section 5, as amended in 2006, provides in relevant part that a voting change is prohibited if it "will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). The text further specifies that the purpose of this provision "is to protect the ability of such citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d).

For the thirty years prior to the 2006 amendments, *Beer* and its progeny defined the VRA's non-retrogression standard. But the district court apparently concluded that Congress in 2006 had made this standard far more rigid and mechanical than it had ever been under *Beer*. In other words, Section 5 would not have required or justified Alabama's racial-targeting policy before 2006, but after 2006, it did.

That remarkable view is wrong. Indeed, if the 2006 amendments to the VRA actually did require the kind of policy Alabama employed here, those amendments "would raise serious, if not fatal, constitutional concerns," as the dissent below rightly observed. J.S. App. 261. Such a policy would not just be racial balancing "for its own sake," *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2424 (2013), it would be racial ghettoization for its own sake, *see Gomillion*, 364 U.S. at 341, without any regard to whether the policy was actually necessary for realizing Section 5's legitimate goal of protecting ability-to-elect districts.

Instead, the 2006 amendments were designed to restore the *Beer* standard, in the wake of this Court's *Georgia v. Ashcroft* decision, not to expand Section 5

dramatically. In *Georgia v. Ashcroft*, the majority had concluded that Section 5 permitted states to reduce the number of ability-to-elect districts if doing so would enhance the political "influence" of minority voters overall. 539 U.S. at 483. The dissent argued that the Court should have stuck with *Beer's* ability-to-elect standard instead. 539 U.S. at 499 (Souter, J., dissenting). Agreeing with the dissenters, Congress amended Section 5 to restore the *Beer* "ability-to-elect" standard. Indeed, restoring *Beer* was the entire *raison d'etre* of that amendment. Both the House and Senate committee reports are clear about that.[22] That is why, consistent with *Beer*, the text of amended Section 5 states that its purpose "is to protect the ability of such citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d).

Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Had Congress intended Section 5 to become even *more* restrictive after 2006 than in the thirty years since *Beer*, someone in Congress would surely have said so—and any such proposed change would have sparked heated debate. But there is no inkling in the more than 15,000-page legislative record of that.

The palpable flaw in the majority's view of Section 5 is illustrated by the majority's celebration of the fact that the BPPs in Alabama's ability-to-elect districts in 2012 appeared to track closely the BPPs going back to

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[22] *See* H.R. Rep. No. 109-478, at 71 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 672; S. Rep. No. 109-295, at 19 (2006).

the 1990s districts. J.S. App. 47-48, 153. How, the majority asked, could the State have done anything wrong if it had merely reproduced what it had been doing since the early 1990s? The majority's view that Alabama's policy was legitimated by how closely the BPPs in the 2012 plan tracked those in the 1993 plan—without regard to changes in black political participation over those decades—exemplifies the majority's legal confusion.

The majority's view would turn both the VRA and the Constitution on their heads. As this Court emphasized in *Shelby County*, the VRA must be tied to "current conditions" to be constitutional and "cannot rely simply on the past." *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2629 (2013). Alabama's policy was not tied to "current conditions" in Alabama. Most strikingly, by the eve of the 2012 plan, black turnout had come to *exceed* white turnout in both presidential and mid-term elections—by 2.9 percentage points in 2010 and by 4 percentage points in 2012. On the eve of the 1990s redistricting, in stark contrast, white turnout exceeded black turnout—by 7.8 percentage points in 1992 and by 5 percentage points in 1990. Thus, these decades saw as much as an 11.8 percentage point swing in the relative rates of black and white participation in Alabama.[23] In the face of these changes—exactly the

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[23] For data on registration and turnout from 1980-2006 in Alabama, *see* Charles S. Bullock III & Ronald Keith Gaddie, *The Triumph of Voting Rights in the South*, App. B, 379-85 (2009). For the subsequent elections in 2008-2012, data is available from the Census Bureau website at http://www.census.gov/hhes/www/socdemo/voting/publications/

sort *Shelby County* identified—the district court's view that Alabama was to be congratulated for keeping BPPs in 2012 at similar levels to those in the 1993 plans demonstrates how poorly the district court understood the principles of *Shelby County* and the requirements of the VRA. Mindless but intentional perpetuation of BPPs decade after decade, even when unnecessary to preserve ability to elect, is hardly what Section 5 requires.

4. The Mere Desire for DOJ Preclearance Cannot Provide an Adequate Basis in Evidence for Alabama's Policy.

At times, Alabama appears to justify its "fixed BPPs" policy by arguing that even if the policy was not required, it is enough that the State hoped the policy would help it garner DOJ preclearance. To the extent the State offers this belief as an independent argument, the desire to obtain DOJ preclearance cannot expand upon "the limited leeway" the State otherwise has in deciding what Section 5 compliance requires. The State cannot cavalierly deploy racial classifications to do anything that it hopes might help earn DOJ preclearance approval.

This Court has recognized that a state cannot adopt an otherwise unconstitutional redistricting policy based on the belief—even the *correct* belief—that doing so

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p20/2008/Table%2004b.xls (2008), http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/Table4b_2010.xls (2010), and http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/Table04b.xls (2012). The general website for these data is at http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html.

would enable DOJ preclearance. Alabama's incorrect belief about what DOJ required cannot have a higher stature. In the past, states have believed that using extremely non-compact majority-minority districts would enable them to obtain DOJ preclearance—and they were right about that. *See, e.g., Shaw I*, 509 U.S. 630. But such districts nonetheless violate the Constitution. *See Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"). Similarly, states have believed that maximizing the number of majority-minority districts would make DOJ's blessing more likely—and they were right about that, too. *See, e.g., Shaw II*, 517 U.S. at 913 (noting that DOJ appeared to be pursuing such an approach); *Miller*, 515 U.S. at 924-25 (same). But as *Shaw II* and *Miller* establish, that DOJ would approve such plans does not provide a constitutionally adequate justification for them. Where, as here, the connection to Section 5 is even further attenuated—where a state invokes unreasonable fears about what DOJ *might* require—there is even less of a legitimate justification.

When public or private actors use race-based measures in anticipation of what they believe federal anti-discrimination law might require, this Court has already established that those measures must rest on a "strong basis in evidence" that federal law actually requires the policies. *Ricci*, 557 U.S. at 583-84. Federal anti-discrimination statutes and the Constitution converge to impose this same requirement. *See Wygant*, 476 U.S. at 277-78 (announcing strong-basis-in-evidence standard under the Fourteenth Amendment). Private employers cannot invoke compliance with Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, to justify race-based policies unless a "strong basis in evidence" exists for the belief that the employer would otherwise be violating Title VII, *Ricci*, 557 U.S. at 583-84.

For the same reason, state actors cannot invoke Section 5 compliance without the same basis in evidence that Section 5 actually requires the state's policy. *Cf. Shaw I*, 509 U.S. at 656. Preclearance was never a license for states to use race excessively in ways otherwise unconstitutional. As the Court explained in *Miller*, to permit the DOJ preclearance process to immunize race-based districting would amount to surrendering to the executive branch the Court's independent obligation to ensure a state's explicit use of racial classifications is constitutional. 515 U.S. at 922-23. In addition, "avoiding meritless lawsuits" cannot constitute an "acceptable reason" for race-based districting not required by a reasonable interpretation of Section 5. *See Shaw II*, 517 U.S. at 908 n.4. Indeed, perpetuating BPPs, with no functional justification, can just as easily prompt litigation, as, of course, it has here.

5. The Fact that DOJ Precleared Alabama's Plans is Irrelevant to this Constitutional Challenge.

The fact that DOJ precleared the plans at issue does not matter for purposes of this constitutional challenge. DOJ preclearance was designed as a floor, not a ceiling, on the use of race in the redistricting process. By statute, DOJ's authority to object was limited in 2012 to ensuring that a plan did not have either a retrogressive

effect or "any discriminatory purpose." 42 U.S.C. § 1973c(b)-(d). Thus, DOJ lacked the legal authority to object to *any* use of race in redistricting (or other voting practices) that did not cause a retrogressive effect on minority voting power or involve any racially discriminatory purpose.

DOJ's own enforcement guidelines recognize that it cannot refuse to preclear a plan on the grounds that the plan constitutes an unconstitutional racial gerrymander (or a one-person, one-vote violation). As the DOJ Guidance states: "The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle, [or] on the grounds that it violates *Shaw v. Reno*, 509 U.S. 630 (1993). " 76 Fed. Reg. at 7470. Thus, DOJ could not have objected to Alabama's plans on the constitutional grounds raised here.

6. Alabama's Policy and the Plans Based on it Are Unconstitutional Under Any Standard of Equal Protection Review.

The sole justification for the State's policy—Section 5 compliance—evaporates under the slightest analytical pressure. As a result, nothing is left to prop up the State's policy.

Alabama's policy therefore does not serve any legitimate, non-arbitrary governmental purpose. Under any level of equal protection review, it is unconstitutional. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam); *Romer v. Evans*, 517 U.S. 620 (1996); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336 (1989); *U.S.*

Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). Whether under minimal review or the somewhat more heightened scrutiny appropriate to this constitutionally sensitive context, Alabama's policy lacks adequate justification.

This is particularly true given the nature of Section 5, which was designed to be a temporary measure for "exceptional conditions." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). For Section 5 to become a justification for permanently and intentionally recreating extraordinarily high BPPs, including in the 70% range, without any legitimate functional need, defies the overall purposes of the VRA itself and raises constitutional concerns. "[E]ntrench[ing] majority-minority districts by statutory command . . . could pose constitutional concerns," *Bartlett v. Strickland*, 556 U.S. 1, 23-24 (2009), and here, Section 5 does not even command Alabama's policy.

"The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Ashcroft*, 539 U.S. at 490. Properly interpreting Section 5 to serve both of these purposes is particularly imperative when it comes to racial redistricting. As Justice Souter wrote for a unanimous Court twenty years ago, "[i]t bears recalling, however, that for all the virtues of majority-minority districts as *remedial* devices, they rely on a quintessentially race-conscious calculus aptly described

as the 'politics of second best.'" *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994) (emphasis added). Before engaging in that politics of the second best, states must have adequate justification.

The effects of Alabama's unnecessary "fixed BPP" policy demonstrate the dangers of unduly expansive state appeals to the VRA. As Senator Dial testified, by requiring the re-creation of black supermajority districts, the policy necessarily diminished the influence of black voters and inter-racial political coalitions in white-majority districts. J.A. 30-31. Similarly, the State would not consider any plan that did not re-create these supermajorities—even plans that maintained the identical number of ability-to-elect districts as the benchmark plan, with all those districts having a black VAP majority. Under the State's policy, that was not good enough to comply with Section 5.

When the VRA actually requires it, a local jurisdiction's use of race reflects a considered national policy judgment that, on balance and despite the risks, such use is necessary to avoid discrimination. But Alabama's policy lacks any such congressional imprimatur. Many years ago, Justice Brennan warned about the risks of permitting racial redistricting beyond the contexts in which the VRA required it. *See United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 172-73 (1977) (Brennan, J., concurring) ("An effort to achieve proportional representation, for example, might be aimed at aiding a group's participation in the political processes by guaranteeing safe political offices, or, on the other hand, might be a 'contrivance to segregate' the group, thereby frustrating its potentially

successful efforts at coalition building across racial lines.") (internal citation omitted). The self-interested partisan and incumbent-protection aims that obviously infect redistricting performed by all political bodies, such as the Alabama Legislature, only further fuel those risks.

Ensuring that Alabama's race-based policy genuinely has a legitimate, non-arbitrary basis also serves as a prophylactic against cynical, but difficult to prove, manipulations of race. Because the policy lacks the minimal justification required under the Equal Protection Clause, the plans based on it are unconstitutional.

B. Alabama's Policy Also Cannot Survive Strict Scrutiny.

1. Strict Scrutiny Is Appropriate.

If the Court finds it necessary to reach the question, Alabama's policy also triggers strict scrutiny. Under the *Shaw/Miller* analysis, there should be little doubt here "that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913. Indeed, as in *Miller*, the evidence of Alabama's "intent to racially gerrymander" is "'overwhelming, and practically stipulated by the parties involved.'" *Id.* at 910 (quoting *Johnson v. Miller*, 864 F. Supp. 1354, 1374 (S.D. Ga. 1994)). The State established its "fixed BPPs" policy at the outset and designed all black-majority districts pursuant to this policy. The redistricters acknowledged their policy's absolute priority: they immediately rejected

any proposed plan that did not adhere to the "fixed BPPs" policy. The plans also had to meet the relevant population-equality standards, but that is true of every plan. The majority below committed legal error and/or clear factual error in concluding that race was not the redistricters' predominant motive, for reasons elaborated further in the ALBC merits brief in No. 13-895 and adopted herein by reference.

But the majority also committed legal error in unreflectively assuming as a starting point that *Shaw's* "predominant motive" test provides the correct legal framework for this case. Instead, the analysis here can be governed by this Court's more general equal protection cases. *See, e.g., Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Parents Involved*, 551 U.S. at 744; *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant*, 476 U.S. at 273.

Shaw was designed for the context of challenges to the *design* of particular election districts, in which determining the reasons for a district's shape are inherently complex. This Court itself has said *Shaw* simply "applied these same principles [of traditional equal protection law] to redistricting," *Miller*, 515 U.S. at 914, but that a unique application was required *in that context* because, on its face, "[a] reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses." *Shaw I*, 509 U.S. at 646; *see also Vera*, 517 U.S. at 958 ("Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found

applicable in redistricting cases than in cases of 'classifications based explicitly on race.'" (quoting *Adarand*, 515 U.S. at 213)).

Here, there is no mystery about Alabama's statewide policy. No need exists for "a more searching inquiry," *Vera*, 517 U.S. at 958, to plumb beneath the lines on a map and dredge up actual purposes. Redistricters will always have general knowledge of racial demographics, *Miller*, 515 U.S. at 916, and mere awareness of race does not trigger strict scrutiny, *Shaw I*, 509 U.S. at 646. But Alabama's policy here goes well beyond that. The excessive use of race is transparent on the face of Alabama's policy: no jurisdiction needs to create BPPs in the 70% plus range to ensure an equal opportunity to elect. In this circumstance, strict scrutiny is appropriate.

Indeed, Alabama's "fixed BPPs" policy is a particularly egregious form of governmental treatment of black persons as little more than numbers. The Constitution requires that redistricters "acknowledge voters as more than mere racial statistics." *Vera*, 517 U.S. at 985. Yet in insisting on its fixed BPP targets, the State paid no attention to evidence of the actual ability to elect, to changes in black turnout and registration over time, and to differences in socio-economic status, educational levels, policy attitudes, and other factors this Court described as relevant in *League of United Latin American Citizens v. Perry*, 584 U.S. 399 (2006). Alabama's policy focused on bare numbers of black people and numbers alone.

The policy Alabama employed here is markedly different from redistricting legitimately done pursuant

to the VRA. Going forward, such redistricting will now take place pursuant only to Section 2 (absent congressional enactment of a new coverage formula for a preclearance regime). When racial redistricting is done under Section 2, numerous procedural and substantive safeguards surround that process. Such districting is by definition remedial, for the first predicate is the existence of significant and sustained patterns of racially polarized voting, that, combined with the design of existing electoral structures, causes minorities to have "less opportunity than other members of the electorate to . . . elect representatives of their choice." *Thornburgh v. Gingles*, 478 U.S. 30, 63 (1986). The need for that remedy is not assumed, but must be proven in particular jurisdictions, one by one.

Moreover, Section 2 remedies are necessarily "limited in time and limited to the wrong." *Parents Involved*, 551 U.S. at 796 (Kennedy, J., concurring). When districts are next redrawn, if the elements of potential Section 2 liability are no longer present, there is no further Section 2 obligation. In addition, the mere presence of even sustained polarized voting is not enough. As this Court made clear in *Johnson v. De Grandy*, Section 2 requires analysis of numerous other factors in a full, totality-of-the-circumstances assessment. 512 U.S. at 1000. Section 2 also requires only districts that are reasonably compact, not more, while Section 5 required preservation of ability-to-elect districts. In Section 2 litigation, plaintiffs also bear the burden of proof on these issues; judicial oversight and fact-finding is present throughout; and courts will resolve any interpretive uncertainties regarding what

Section 2 actually requires. *Bartlett*, 556 U.S. at 15. And under Section 2, "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy*, 512 U.S. at 1020. If a jurisdiction defensively asserts Section 2 as its only justification for racial redistricting, there must be an adequate basis in evidence for that position.

Where sustained polarized voting exists, carefully circumscribed racial redistricting is not only remedial, it is also integrative. If, in the context of public education, the "legitimate interest government has in ensuring all people have equal opportunity regardless of their race" can justify race-conscious policies, *Parents Involved*, 551 U.S. at 787-88 (Kennedy, J., concurring), the integrative interest government has in ensuring the equal opportunity of citizens to participate fully in the most basic right of citizenship—choosing and holding accountable their political representatives—must be at least as forceful. Properly applied, Section 2 serves that integrative interest, too. Other race-conscious measures that do not involve excessively racialized means might also be legitimate to serve that integrative interest. *See id.*

It should be immediately apparent, however, that Alabama's crude "fixed BPPs" policy—particularly when BPPs are fixed at such exceptionally high levels—serves none of these remedial or integrative purposes and triggers strict scrutiny even without a need for *Shaw's* inquiry into "predominant motives."

2. Alabama's Policy Is Not Narrowly Tailored.

Under strict scrutiny, this Court has assumed many times that complying with the VRA constitutes a compelling interest. *See, e.g., Vera*, 517 U.S. at 977; *Shaw II*, 517 U.S. at 915; *Miller*, 515 U.S. at 920-21. There is no reason to change that assumption here. But for the same reasons that Alabama's policy lacks a legitimate, adequate justification under any standard of review, as demonstrated above, that policy cannot be narrowly tailored to Section 5 compliance and thus must fall under strict scrutiny.

II. The District Court Erred in Holding Appellants Lack Standing.

Sua sponte, the district court raised a new standing issue in its final opinion on the merits. The majority concluded that the ADC lacked standing to bring its claims based on the majority's view that the ADC was required (and had failed) to present evidence that its members lived in specific, relevant districts. J.S. App. 136-38.[24] That was the first time any party or the court raised this particular requirement.

At that point, of course, appellants had no opportunity to respond. Because this issue was never briefed or argued, the majority below committed several significant errors. The Court should reverse

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[24] The majority likewise held that there was insufficient proof that any of the individual named plaintiffs "will reside in any of [the challenged] districts under the Acts." J.S. App. 139.

the standing ruling, or vacate and remand for appropriate consideration.

A. ADC Plaintiff Stallworth Has Standing Even Under the Narrowest Standing Rule Potentially Applicable.

In a racial gerrymandering challenge to the design of a particular district, standing under *United States v. Hays*, 515 U.S. 737 (1995) requires either that: (1) the plaintiff live in the particular district being challenged; or (2) "otherwise demonstrate[]" that he or she has "personally...been subjected to a racial classification." *Id.* at 739. As explained below, *Hays* is not the proper framework to analyze standing in this case. Nonetheless, even under *Hays*, individual plaintiff Stallworth, for example, indisputably has standing. The parties stipulated, and the State's proposed findings acknowledged a second time, that Stallworth resides in proposed HD 77, J.A. 181, designed to have a 67% BPP in the 2012 redistricting, and shaped under the statewide policy challenged here. The majority's failure to recognize that this case challenges a statewide policy applied in every black-majority district precluded it from recognizing Stallworth's standing.

Given Stallworth's standing to challenge application of the State's policy to her district at least, the Court need not address further standing issues. Where at least one party has standing, the Court regularly proceeds to the merits. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (plurality); *id.* at 209 n.2 (Souter, J., dissenting); *McConnell v. FEC*, 540 U.S. 93, 233 (2003), *overruled*

on other grounds, *Citizens United v. FEC*, 558 U.S. 310 (2010); *Clinton v. City of N.Y.*, 524 U.S. 417, 431-32 n.19 (1998); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

B. The ADC Also Has Standing Both in Its Own Right and in Its Capacity to Represent its Members.

Should the Court decide to reach additional issues concerning the ADC's standing, the Court must assess both ADC's organizational and representational standing.

Under representational standing, an organization may have standing as the representative of its members, if, among other things, the "members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

But in addition to representational standing, there "is no question that an association may have standing *in its own right* to seek judicial relief from injury to itself." *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (emphasis added); *see also, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260-63 (1977); *NAACP v. Button*, 371 U.S. 415, 428 (1963). To establish such standing, an organization, like any other plaintiff, must prove that the challenged conduct has caused the organization the requisite injury-in-fact. *See, e.g.*, *Havens Realty*, 429 U.S. at 378-79; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Int'l Union, United Auto., Aerospace &*

Agric. Implement Workers of Am. v. Brock, 477 U.S. 274, 281-82 (1986).

The majority below (1) failed to address the ADC's claim to organizational standing in its own right and (2) erred in its analysis of the ADC's right to sue in its representative capacity.

1. The ADC Has Organizational Standing.

The ADC argued that it had standing in its own organizational right, even apart from whether its members individually had standing to challenge any particular district.[25] Because the court below neglected even to address this issue, this Court should vacate and remand to the district court with instructions to consider the ADC's organizational standing claims, particularly if the Court is going to remand in any event.

Should the Court reach the issue, however, the ADC demonstrated that it has adequate organizational standing. Importantly, this case involves a constitutional challenge not to the design of any one specific district, but to a statewide policy applied directly in every black-majority district. The ADC is a particularly appropriate plaintiff to challenge this statewide policy.

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[25] ADC Memorandum in Response Defendant's Motion for Summary Judgment, at 43-44.

a. The ADC Has Organizational Standing in Its Own Right.

The ADC presented uncontested evidence that the policy challenged here will cause it organizational injury-in-fact. An organization can make out the requisite injury-in-fact by showing that the effects of the challenged action will "perceptibly impair[]" the organization's ability to perform its mission, or "drain . . the organization's resources" by forcing it to redirect its activities to combating the ill effects of the action challenged. *Havens Realty Corp.*, 455 U.S. at 379. "[T]here can be no question" that such organizational injuries constitute the requisite Article III injury in fact: "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *Havens Realty*, 455 U.S. at 379; *see also Crawford*, 553 U.S. at 189 n.7 (plurality) (agreeing "with the unanimous view" of the court below "that the Democrats have standing to challenge the validity of" Indiana's voter identification law); *id.* at 189 n.7 (2008) (plurality); *id.* at 209 n.2 (Souter, J., dissenting) (same); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (Pryor, J.).

The ADC made such a showing of organizational injury-in-fact here. As the district court found, the ADC was created in 1960 for the very purpose of advancing the political influence of black residents of Alabama, through education, registration, turnout drives, formation of political coalitions, and the like.

J.S. App. 76; J.A. 46, 183. Dr. Reed's affidavit explained how that mission would be affected, and how those limited resources would be diverted, in response to the policy challenged here. J.A. 184-87.

He explained, for example, that the State's policy would affect the ADC's political-participation mission because it would result in new, confusing precinct reassignments that often require citizens in a single county to cast ballots in different precincts for State House and Senate races, as well as county positions. J.A. 184-85. To ensure minority participation under the new regime, the ADC would be required to divert its limited resources to voter education and transportation to scattered precincts. J.A. 185-86. In addition, because these difficulties would directly affect minority voters, among others, the challenged redistricting plans would also have concrete effects on the ADC's mission of "helping African Americans to be able to run for office and to hold high positions." J.A. 183. There "can be no question" that these kind of direct injuries to the ADC's long-standing organizational mission, constitute injury-in-fact. *Havens Realty*, 455 U.S. at 379.

The State has never contested any of these facts. Instead, the State has argued that, as a legal matter, *Hays* precludes *any* organization from bringing racial gerrymandering claims. But *Hays* does not do so and the ADC has standing in its own organizational right.

b. Hays Does Not Preclude an Organizational Challenge to a Statewide Policy.

Hays said nothing about organizational standing for a simple reason: that case involved no organizational plaintiffs. *See* 515 U.S. at 741. Indeed, a statewide organization that suffers direct injury-in-fact from a statewide policy that affects districts throughout the state is a particularly appropriate plaintiff.

The court below apparently believed that *Hays* provides the only framework in which to analyze standing to bring a racial gerrymandering claim. But *Hays* is not an all-purpose standing rule for any complaint in which the words "race" and "redistricting" appear. The nature of the substantive constitutional claim being advanced determines the appropriate standing requirements. *See, e.g., Lujan*, 504 U.S. at 560 (requiring "causal connection between the injury and the *conduct complained of*" (emphasis added)). The *Shaw* claims of the 1990s were challenges to the design of particular districts. For *those* kinds of claims, *Hays* provides the corresponding standing rule. But that is not this case. Here, plaintiffs challenge not one district in isolation, but a statewide policy, applied directly in every black-majority district and necessarily affecting other districts. As Senator Dial's testimony demonstrates, *supra* p. 10-12, the State's singular focus on racial data from the starting gate tumbled "like a domino" through each district's boundaries. Any person or organization that suffers injury-in-fact from

that policy necessarily has standing to seek declaratory and injunctive relief against the plans as a whole.[26]

2. The ADC Also Has Representational Standing.

a. The record also establishes that the ADC has standing in its representative capacity, even under *Hays*. The ADC has shown that it has at least one member who lives in a majority-black district designed under the statewide policy challenged here and that is sufficient to establish representational standing. *See Lujan*, 504 U.S. at 563 (organizations need only prove that "one or more of [its] members" face an injury-in-fact); *Warth*, 422 U.S. at 511 ("The association must allege that its members, or any one of them, are suffering immediate or threatened injury").

The issue of the ADC's representational standing was never joined below. The State argued that *Hays* precluded organizational standing altogether, but never argued that the ADC was required to show that it had members in any, some, or all of the challenged black-majority districts.[27] Nor did the State contest whether

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[26] This case is therefore more akin to a statewide one-person, one-vote challenge to a districting plan. Such cases hardly require that there be one named plaintiff residing in each allegedly overpopulated district. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 729 (1983) (simply describing plaintiffs as "a group of individuals with varying interests, including all incumbent Republican Members of Congress from New Jersey").

[27] The State's standing arguments, made only at summary judgment and in proposed post-trial findings and conclusions, are at J.A. 204, 205, 208.

ADC had made that showing in fact. The district court did *not* reject ADC's standing on the basis of the State's arguments. Instead, this purported requirement to identify the district residence of the ADC's individual members arose for the first time in the district court's final opinion. In its brief analysis, the district court committed several errors.

First, the district court failed to recognize, as noted above, that individual plaintiff Stacey Stallworth has standing.

Second, the district court failed to recognize the import of Dr. Reed's uncontested testimony that the ADC "has members in nearly every county in the State of Alabama." J.A. 183. While the district court found this insufficient for standing because some counties contain multiple districts and it is thus theoretically possible that all of the ADC's members in that county might be condensed into one or more non-majority-black districts, the court failed to recognize that its concern was misguided with respect to at least some counties and districts. All of Butler, Dallas, Lowndes, Perry, and Wilcox counties are in SD 23, a 64.8% BPP district under the 2012 plans; all of Sumter and Greene counties are in SD 24, a 63.3% BPP district; and all of Barbour, Bullock, Henry and Macon counties are in SD 28, a 59.96% black district. J.A. 200. Because the record sufficiently establishes that the ADC has members in these districts, the ADC has representational standing to challenge the statewide policy as it was applied in these districts.

Third, Dr. Reed, the ADC's Chairman/President, provided his own address in his testimony, from which

the Court can take judicial notice that he is assigned to SD 26, at 75.2% BPP, another one of the majority-black districts. J.A. 46.[28]

Fourth, the record shows that ADC individual plaintiffs Pettway and Stallworth were previously in HD 73, which was abolished in part to meet the State's racial targets in other districts. J.S. App. 209-10 n.21. As *Shaw II* recognized could be the case, these plaintiffs have therefore "provided specific evidence that they personally were assigned to their voting districts on the basis of race," 517 U.S. at 904, and, as the dissent concluded below, they, too, have standing for this reason. J.S. App. 209-10 n.21.

Finally, the most reasonable inference from the trial testimony was that the ADC had at least one member in many, if not all, of the black-majority districts. The State never asserted otherwise. The district court's representational standing analysis was therefore erroneous. As with organizational standing, this Court need not decide the issue of the ADS's standing to

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[28] The Alabama Legislature's webpage (www.legislature.state.al.us) contains a tool that provides voting district information for any given voter address (one enters the relevant zip code in the "Find Your Legislature" box on the left-hand portion of the page; if the zip code contains more than one district, additional address information is requested). This Court can take judicial notice of this information because it is available through official, public records and not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *see also* Fed. R. Evid. 201(d) (judicial notice may be taken at any stage of the proceedings); *Mass. v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (taking judicial notice by reference to Coast Guard records).

proceed with the merits given the standing ADC plaintiff Stallworth, but in no event should the Court affirm the district court's erroneous holding on the ADC's representational standing. At the very least, remand is required on this issue.

b. To eliminate any question about specific district residences of the ADC's members, appellants have requested permission to lodge with the Court an affidavit from Dr. Reed confirming the obvious import of his prior testimony—that at all relevant times the ADC has had members in numerous black-majority, and other, districts. *See* S. Ct. R. 32.3. This Court recently permitted, and relied upon, a similar lodging to confirm standing in comparable circumstances in *Parents Involved in Community Schools v. Seattle School District Number 1*, 551 U.S. 701 (2007); *see id.* at 718; App. A (reproducing lodging).

* * *

No level of government claims responsibility for Alabama's crude race-based policy in an area of exceptional constitutional sensitivity. Alabama disavows any basis of its own for the policy, but federal law does not require it. That policy lacks a legitimate, rational justification and, if that is not enough, also cannot survive strict scrutiny.

CONCLUSION

Appellants respectfully request that the Court reverse the judgment below.

Respectfully submitted,

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ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other

crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C.A. § 1973c (effective: July 27, 2006)

§ 1973c. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any

voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that

no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

42 U.S.C.A. § 1973c (2005)

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting

qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer

or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

APPELLEE'S BRIEF

RECORD & AND BRIEFS

Supreme Court, U.S.
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Nos. 13-895, 13-1138

In the
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*
Appellants,
v.
ALABAMA, *et al.*
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*
Appellants,
v.
ALABAMA, *et al.*
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

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October 9, 2014

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QUESTIONS PRESENTED

Appeal No. 13-1138 and Appeal No. 13-895 have been consolidated for a single argument. This brief addresses the following questions:

1. Whether the plaintiffs proved that Alabama's legislative redistricting plans for the House and Senate unconstitutionally classify black voters by race on a statewide basis, even though they did not show that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

2. Whether the plaintiffs in Appeal No. 13-1138 have standing to challenge the House and Senate plans.

PARTIES

All parties are listed in the two appellants' briefs.

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TABLE OF ABBREVIATIONS

ADC	Alabama Democratic Conference; also the plaintiffs associated with the Alabama Democratic Conference
ALBC	Alabama Legislative Black Caucus; also the plaintiffs associated with the Alabama Legislative Black Caucus
ALBC Br. App.	The appendix to the ALBC's Brief in appeal No. 13-895
App.	The appendix to this brief
APX	An exhibit introduced at trial by the ALBC
C	A "common" exhibit introduced at trial by all parties
DOJ	Department of Justice
DX	An exhibit introduced at trial by the defendants
HD	House district
J.A.	Joint Appendix
J.S. App.	The appendix to ALBC's jurisdictional statement in Appeal No. 13-895
Rep.	Representative
SD	Senate district
Tr.	Trial transcript; citations are to volume.page number (ex.: Tr. 1.123)

INTRODUCTION

For much of the previous century, Alabama was notorious for its refusal to comply with federal election law. This is why Congress passed the Voting Rights Act of 1965. This is why the Court ruled in *Reynolds v. Sims*, 377 U.S. 533 (1964), that states must have legislative districts of equal population. This is why Alabamians march across the Edmund Pettus Bridge every spring. This history is powerful. Its toll is heavy.

The weight of this history motivated Alabama's new Republican leaders in 2010 to comply strictly with federal law, cooperate with black legislators, and draw fair redistricting plans for the state House and Senate. The plans they adopted kept the percentage of majority-black districts on a statewide basis proportional to the black voting population. The plans created an additional, compact majority-black House district in an area where the black population was growing. And, as explained below, the plans are not consistently different from the plans that the plaintiffs in this litigation proposed during the legislative process. The plans did not, however, preserve specific features of a 2001 partisan gerrymander designed to elect white Democrats. And that is what this litigation is about.

For their part, the plaintiffs are not asking the Court to undo a racial gerrymander, but to order one. The plaintiffs suppose that gerrymandering is the best explanation for why the majority-black districts in Alabama have "supermajority percentages" of black persons. But that would come as a surprise to

the many black Alabamians who live in counties and cities that are mostly populated by members of their own race.

Consider, for example, the plaintiffs' suggestion that the black population of HD 67 in Dallas County is best explained by the application of a "quota" or "policy." The population of Dallas County is 70% black. App. 7a. The county to the southeast, Lowndes County, is 74% black. The county to the northwest, Perry County, is 69% black. The county to the southwest, Wilcox County, is 73% black. *Id.* It would take a naked racial gerrymander to make the population of HD 67 anything but what it is. The same is true in Birmingham, Montgomery, and many of Alabama's small towns and rural areas.

We agree with the United States that the plaintiffs' blunderbuss attack on these House and Senate plans cannot succeed. The plaintiffs' statewide claims are inconsistent with this Court's caselaw and contrary to common sense. When a state's legislative leaders say they prioritized compliance with federal law in a statewide redistricting plan, they are recognizing the Supremacy Clause, not confessing to a racial gerrymander.

We part ways with the United States on the notion of a remand, however. With the exception of four Senate districts that the district court separately and thoroughly addressed, the plaintiffs have always disclaimed any district-specific challenges. The three judges on the district court should not have their four-day trial and final judgment undone to let the plaintiffs make new arguments about districts they have never challenged. The Court should affirm the district court.

STATEMENT

I. Alabama's 2010 redistricting process

After the 2010 census, the Alabama Legislature's Reapportionment Committee held an unprecedented 21 public hearings at locations throughout Alabama, consulted lawmakers of both parties, and hired a redistricting expert to use modern computer modeling. J.S. App. 30-36. The Committee developed proposals for Alabama's 105 House districts and 35 Senate districts, which were enacted in substantial form on party-line votes. They were submitted for preclearance under Section 5 of the Voting Rights Act and approved by DOJ.

A. The Legislature adopted a 2% deviation, which limited opportunities for manipulation and gamesmanship.

After listening to several days of live witness testimony about the way these plans were drafted, the district court found as a matter of fact that, "[a]bove all," the drafters' foremost subjective goal was to "create more equality among districts throughout the State." J.S. App. 144. *See also* J.S. App. 94-105 (recounting testimony and expressly crediting testimony). Because of its focus on greater population equality, the Legislature drew new electoral maps with population differences that do not exceed 2%. *See* J.S. App. 27. A 2% variation allows for plus or minus 1% deviation from the "ideal" district. In real terms, this meant the population of each Senate district could vary only within a range of 2,730 people (2% of

136,564). Tr. 2.86. House districts could vary within a range of 910 people (2% of 45,521). By contrast, a deviation of 10% would permit a variance of 13,564 people in the Senate and 4,552 people in the House. *Id.*

The drafters' decision to adopt a 2% deviation had several important effects.

First, it ended key features of a previous partisan gerrymander. The Democrat-controlled Legislature in 2001 engaged in a "successful partisan gerrymander" by using a 10% deviation to "systematically under-populate[] majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated." J.S. App. 18, 145. *See* J.S. App. 17-24 (recounting history of the 2001 gerrymander). This strategy allowed the Democrats to spread black voters into neighboring majority-white districts so they could vote in support of white Democratic candidates. The partisan gerrymander meant that, with just 51% of the statewide vote in 2002, the Democratic Party controlled 71% of the Senate seats and 60% of the House seats. J.S. App 24.

Because of the previous partisan gerrymander and organic population changes, all the majority-black districts were grossly under-populated after the 2010 census, and most of the majority-white districts were over-populated. Nine of the majority-black House districts were under-populated by more than 20% compared to the ideal district. J.S. App. 18. Similarly, seven of the eight majority-black Senate districts were under-populated by more than 10%, and two of those by more than 20%. J.S. App. 19. Performing the Democrats' 2001 partisan gerrymander in reverse, the drafters repopulated these majori-

ty-black districts by removing contiguous population from majority-white districts.

Second, the 2% deviation "reduced, from the outset," the Legislature's "ability to pack voters for any discriminatory purpose, whether partisan or racial." J.S. App. 144-45. The 2% deviation thus represents the best practices of other States. *See* J.S. App. 29-30. *See also* J.S. App. 106-07 (recounting expert testimony about other States' practices). California, Florida, Georgia, Illinois, Indiana, Iowa, Minnesota, Nevada, Oklahoma, Utah, Virginia, Washington, and Wisconsin all used a 2% deviation or less to redistrict one or both houses of their legislatures after the 2010 census. J.S. App. 29-30.

Third, the 2% deviation required the drafters to split precincts and counties. As we discuss *infra* 52-54, one of the plaintiffs' experts explained at length that the 2% deviation caused the number of county and precinct splits in the drafters' plans.

B. The Legislature complied with the Voting Rights Act.

The district court also expressly credited the testimony of the plan's drafters that, after population equality, their next highest subjective goal on the statewide level was to comply with the Voting Rights Act. *See* J.S. App. 94-105 (recounting and crediting testimony). The Alabama Legislature had to comply with Sections 5 and 2 of the Voting Rights Act to ensure that the plans were precleared by DOJ and withstood any vote-dilution litigation.

1. The credible evidence is that a safe majority-black district in Alabama should be more than 60% black.

It is undisputed that black political leaders told the drafters and district court that only districts with sizable black majorities, not bare majorities, would allow black voters to elect their candidates of choice as required by the Voting Rights Act. *See* J.S. App. 31, 96, 99. This includes the "dean of Alabama redistricting," Dr. Joe Reed, who has led the ADC since the 1970s and drawn numerous state and local districting plans in Alabama. J.S. App. 162, 165. He testified that districts must be at least 60% black, and sometimes more than 65% black, to allow black voters to elect the candidate of their choice. J.S. App. 76-77. *See also* J.S. App. 165 (expressly crediting Reed's testimony). These figures are supported by caselaw. *E.g.*, *Texas v. United States*, 831 F. Supp. 2d 244, 263 (D.D.C. 2011).

Dr. Reed and other black political leaders told the drafters that the percentage of black persons in a district does not accurately indicate the percentage of black persons who vote. J.A. 50-51, 177. Indeed, because the black population is younger than average, it is undisputed that the percentage of *voting-age* black persons in a district is generally two to three percentage points lower than the percentage of black persons overall. *See* J.S. App. 49-50, 76. This means that black persons are likely a minority of voters in a district that is 51% black.

Although black political leaders also warned the drafters against "packing," they indicated that packing would only be a concern when black population

percentages reached materially higher levels than 60% to 70%. Rep. Jackson, for example, warned the drafters at a committee meeting that he was "very concerned about" packing minority voters into a district that is "ninety-nine percent minority." J.A. 178. Instead, to prevent packing, he suggested that a minority district should be "sixty-two percent or sixty-five percent" black. J.A. 178. Senator Sanders similarly explained that "the majority African-American districts . . . ought not be less than 62 percent" and, separately, "I would hope that there's not packing." *See also* J.A. 177. Black political leaders were also concerned with manipulating black populations to help "conservative white Democrats." J.A. 174.

2. The drafters believed that black population percentages significantly below those in the prior plan would violate Section 5.

The drafters of the reapportionment plan believed that Section 5 of the Voting Rights Act prohibited them from "lowering the overall total number of majority African American districts in either plan" or making the minority population of a district "significantly below" what it was "looking at 2010 census [data] as applied to 2001 lines." J.A. 88. They were especially concerned about "large deviations from previous percentages" that they would have to explain to DOJ. APX 75 at 24-25 (Hinaman Depo.). As a strategy to comply with Section 5, the drafters decided to avoid reducing the black population of preexisting majority-black districts where possible.

This strategy did not impact the shape of some majority-black districts at all. Randy Hinaman, the political consultant who drew the new district lines, explained that he would add *any* contiguous precincts to the under-populated majority-black districts. J.A. 88 (explaining that he "may add a majority white precinct" or "a majority African American precinct"). Only after adding population to the under-populated majority-black districts "en masse" would he look at the "end number" for that district. J.A. 87-88. "And so in some districts I could add in anything I wanted, and it didn't matter because" the district did not need much additional population or "the changes I added didn't matter" for the black percentage. J.A. 87.

Although the ALBC says that the political consultant "selected particular areas, precincts or census blocks" on the basis of race, ALBC Br. 13, there is no citation for that sentence because that is not what the consultant did. Instead, the political consultant was adamant that he looked at race only *after* repopulating the majority-black districts based on other criteria. "I was trying to look at the overall total change to the district, not to any one specific precinct." Tr. 3.144. "I would look at the changes I made in toto to see what it did to the overall black percentage of the district . . . . It was the overall number." Tr. 3.145. "I tried to look at the additions en masse, not just a precinct." J.A. 87-88. Only when these additions led him to be "concerned about retrogressing" did he "look at the nature of the precincts [he] was adding." J.A. 87.

Sometimes the drafters did not come close to the prior black percentages in the districts, but some-

times they did. The ALBC uses figures from our trial exhibits to compare the old and new districts. *See* ALBC Br. 5a-7a. But these figures differ from the ones in the plaintiffs' own court submissions, which are the only figures in the Joint Appendix.[1] *See* J.A. 103-108. Regardless, both sets of numbers show that the drafters varied from the previous districts from about -9% up to about +9% in the House and from about -14% up to about +9% in the Senate. *See* ALBC Br. 5a-7a.

Alabama's plans successfully complied with the Voting Rights Act. The plans kept the same number of majority-minority districts in the Senate and added an additional majority-minority district in the House. J.S. App. 36, 46-48. The majority-black districts in the new plan are comparable to the districts in the old plan, which was drafted by black leaders and approved by the Democrat-controlled Legislature. *See* J.S. App. 46-56.

C. The drafters changed all the districts, majority-black and majority-white, "the least amount possible."

The drafters had many other goals, which they also accomplished. Most of the drafters' other goals had to do with keeping the new districts the same as the old ones. In fact, it was a "goal to change each

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[1] We are not sure why there are discrepancies between the plaintiffs' figures in the Joint Appendix and the figures in our exhibits in the district court. We note that the majority and dissent below also put slightly different numbers in their charts. Nonetheless, the differences are minor and do not meaningfully change the comparison.

district," whether majority-white or majority-black, "the least amount possible." J.A. 112-113. This means that "if Senate District X had these four counties," the drafters would "try to keep it as close to those four counties as possible." J.A. 113. The drafters also attempted to preserve the core of existing districts, satisfy the wishes of incumbents, and not make incumbents run against each other. J.S. App. 33.

A comparison between the old maps and new maps shows that the drafters generally accomplished their goal of consistency between the old and new districts. *See* J.A. 191-194. The unusual geographic features of the new districts are the same as they were in the prior plan. For example, SD 23 still has a triangular incursion into Conecuh County. The north/south line dividing Marengo and Clarke Counties between SD 23 and SD 24 still follows Highway 43. *Compare* J.A. 191 *with* J.A. 192. SD 24 had an "arm" stretching into Tuscaloosa County in the old plan and still has that "arm" now. *Compare* J.A. 191 *with* J.A. 192. Old SD 27 followed a jagged path through Lee and Russell Counties, and it still follows that unusual path. *Compare* J.A. 191 *with* J.A. 192.

The story is the same in the House. For example, old HD 33 east of Birmingham had a narrow "tail" running north along HD 32, and that feature remains in the new plan. *Compare* J.A. 193 *with* J.A. 194. There are many more examples that the Court can see by comparing the old and new maps.

It is unsurprising that the drafters placed such a high premium on changing all the districts, majority-black and majority-white, "the least amount possible." J.A. 112-13. In 2010, the Republican Party won

control of the Alabama Legislature for the first time since the 1800s. As one of the plaintiffs' experts testified, "when legislators draw districts, we all know that partisanship is the most important factor." J.A. 116.

D. Some changes reduced the influence of the Democratic Party.

Two significant changes in Montgomery and Birmingham reduced the influence of the Democratic Party in the state House of Representatives. There were also some minor changes in the Senate plan that altered purported "influence" districts.

Montgomery County is in the center of a broad geographic belt across the southern portion of the state—stretching from HD 71 and HD 65 in the west to HD 83 and HD 84 in the east—in which all the House districts were under-populated in 2001 and had lost significant population since then. We have reproduced a map of the old districts in the appendix to this brief that shows the under- or over-population in each district. *See* App. 12a. Under the benchmark 2001 plan, Montgomery County itself was divided into six House districts, three majority-black districts (76, 77, 78) and three other districts (73, 74, 75). J.S. App. 37. HD 78 and HD 77 were majority-black districts represented by black legislators, and they were respectively the most under-populated (-32.16%) and the fourth most under-populated (-23.12%). J.S. App. 47. HD 69 was a majority-black district in neighboring Lowndes County that was under-populated by 17%. *See* App. 12a.

Rep. Thad McClammy, a black representative from Montgomery, proposed a new map for the area that solved the under-population problem in the region. The map expanded the borders of some of the under-populated districts to consume all of the population of HD 73. J.S. App. 35. By 2012, HD 73 had become a district with a plurality black population that was represented by a freshman white Democrat named Joe Hubbard. J.S. App. 35. Rep. McClammy's map was the consensus recommendation of the legislators in the Montgomery area, except for Rep. Hubbard. *See* J.A. 100-01; Tr. 3.234. The drafters accepted Rep. McClammy's recommendation and created a "new" HD 73 in Shelby County, where the districts were over-populated by up to 60%. J.S. App. 18, 35-37; App. 12a.

A similar scenario played out in Jefferson County. The majority-black House districts that were clustered together in the Birmingham area were all under-populated. J.S. App. 37. In 2001, Jefferson County was divided into nine majority-black districts (52 through 60) and nine majority-white districts. J.S. App. 37-38. Six of the nine majority-black districts were under-populated by roughly 20% or more. J.S. App. 47. These nine majority-black districts were collectively under-populated by 76,427 people, which is the population of approximately 1.5 "ideal" House districts. DX 406 at 4-5 (chart with deviations); Tr. 2.86.

Accordingly, as they did in Montgomery, the drafters used the population of one of the under-populated districts to bring the population of the surrounding districts up to the ideal population. J.S. App. 38. The drafters chose to eliminate HD 53 be-

cause they believed that the incumbent from that district intended to retire because of his age. APX 75 at 132:9-14 (Hinaman Depo). (The incumbent later passed away. J.S. App. 12.) This change allowed the drafters to create a new majority-black district in the Huntsville area where the population had been growing. J.S. App. 37-39, 103-04.

There were also a few changes in the Senate plan that disrupted districts that had previously been gerrymandered to help elect white Democrats. The ADC specifically challenged the drafters' changes to three majority-white "influence" districts: SD 7 in Huntsville, SD 11 in east Alabama, and SD 22 in south Alabama. The district court separately addressed these challenges and found, without contravention by the dissenting judge, that these changes were not related to race. *See* ALBC J.S. App. 39-42, 61-62, 70-74, 166-71.

II. Procedural history

In the court below, the district court was "presented with one set of plaintiffs who argued about discriminatory purpose and another set of plaintiffs who argued about strict scrutiny, but no set of plaintiffs who argued both." J.S. App. 128. The ADC argued below that the lines of four specific Senate districts were race-based, three majority-white (SD 7, SD 11, SD 22) and one majority-black (SD 26). The ALBC never argued that the lines of any specific district were predominantly driven by race. To the extent that the ALBC discussed specific districts and counties, it was only to illustrate its allegation that the plans were *partisan* gerrymanders with "the

purpose and effect of minimizing the opportunities for black and white voters who support the Democratic Party." Doc. 60 ¶¶ 69-70, 72-81, 84.

After granting judgment for the state defendants on most of the plaintiffs' claims, the three-judge court held a consolidated bench trial on the ALBC and ADC's claims of intentional discrimination on the basis of race. J.S. App. 11-12; *see also* J.S. App. 278-79, 418-26. At trial, both sets of plaintiffs reiterated their "statewide" claim that the plans "systematically packed" all of the majority-black districts, showing "intentional discrimination in violation of the 14th and 15th Amendments." Tr. 1.4-5, 7. The ALBC's post-trial proposed findings of fact and conclusions of law suggested that the court find that race was the predominant factor in drawing the plans statewide, but did not suggest any fact-findings about the racial gerrymandering in any specific district. Doc. 194 ¶¶ 112-16. The ADC's post-trial filing mentioned specific districts to support its Section 2 claim and county-splitting arguments, but suggested no fact-findings about the lines of specific districts in support of their gerrymandering claim. Doc. 195-1 ¶¶ 11-15, 144, 176, 179-262.

As the district court explained, to the extent that the plaintiffs made any racial gerrymandering claim, it was a statewide one. J.S. App. 127-28. The court explained that "[t]he Black Caucus plaintiffs routinely cited decisions of the Supreme Court on claims of racial gerrymandering, but never identified which districts they alleged were racially gerrymandered and introduced little evidence to prove a discriminatory intent." J.S. App. 127. The court therefore "construe[d] the filings of the Black Caucus plaintiffs . . .

as arguing that the Acts as a whole constitute racial gerrymanders." J.S. App. 127. It rejected that claim because it found, as a factual matter, that "[r]ace was not the predominant motivating factor for the Acts as a whole." J.S. App. 140-65.

The court concluded that the ADC lacked standing to bring a statewide claim of racial gerrymandering. J.S. App. 138. It also construed the ADC's filings "to present district-specific racial gerrymandering challenges to SD 7, 11, 22, and 26," even though the ADC did not mention SD 26 in its complaint. J.S. App. 138, 171. The district court rejected those claims, concluding that race was not the predominant factor in drawing SD 7, 11, 22, or 26. J.S. App. 140, 152, 166-73.

This appeal followed.

SUMMARY OF ARGUMENT

This brief proceeds in four parts. First, we address failings in the plaintiffs' statewide legal theories. Second, we address the district court's fact-findings. Third, we address the ADC's lack of standing. And, fourth, we address whether the plans meet rational basis and strict scrutiny on a statewide basis.

I. On appeal, the plaintiffs have renewed their statewide claims against the redistricting plans "as a whole." These claims are inconsistent with this Court's precedents, which require plaintiffs to prove that the lines of specific districts were drawn because

of race. There are four compelling reasons not to change the law in the way the plaintiffs suggest.

A. Because of the Supremacy Clause, redistricters must always prioritize compliance with federal law in a plan "as a whole." But this does not mean that race was the most important factor, or even a factor, with respect to the lines of any particular district. Other redistricting criteria can still determine where redistricters draw specific lines, even if they have statewide goals related to race.

B. The Court cannot apply strict scrutiny in a meaningful way to the plaintiffs' statewide allegations. Section 5 imposed undisputed requirements on the state, which cannot be isolated from the drafters' preclearance strategy. The plaintiffs do not argue that all the majority-black or majority-white districts are problematic. And some majority-black districts are indisputably consistent with the plaintiffs' own view of Section 5.

C. There is also no remedy for the plaintiffs' claims. Vacating the plans in their entirety is inconsistent with the presumption in favor of legislative districting. Vacatur would also not lead to meaningful remedial changes. It would be error for a court to draw a new plan with the goal of creating "influence districts." And there is no reason to believe that the Republican Legislature would propose a remedial plan that intentionally helps more Democrats be elected.

D. Finally, because Section 2 already protects against "packing," there is no reason for the Court to change equal protection caselaw to address the plaintiffs' statewide claims. The plaintiffs made a

Section 2 "packing" claim below, but it failed under well-established Section 2 precedents.

II. The Court should also reject the plaintiffs' statewide claims on the facts of this case. The district court was correct that the features of the plans that the plaintiffs criticize are attributable to the 2% deviation and other race-neutral districting criteria, not the drafters' preclearance strategy.

A. The plaintiffs' competing plans do not draw majority-black districts with consistently different populations of black persons. The plaintiffs' majority-black districts have characteristics that they criticize in the drafters' plans, such as districts that are more than 70% black. Where there are major differences, they are attributable to the plaintiffs' disagreement with the drafters' race-neutral criteria. The consistent difference between the Legislature's plans and the competing plans is that the plaintiffs' plans do not comply with the 2% deviation. The ADC's chairman personally asked the district court to order the Legislature to draw new plans, "follow[ing] their own rules, except for this one person—this plus or minus one" percent.

B. The district court also explained that, on a statewide basis, race-neutral districting criteria accounts for most of the similarity between the majority-black districts in the old plan and the new plan. Voters are not fungible units that can be moved around to create artificial 50% black districts; they are tied to specific geographic locations. This is why some of the majority-black districts in plaintiffs' own plans are close to the "quota" and why the new plan

is similar to the 2001 plan, even using 2001 census figures.

Moreover, the drafters used preexisting district lines to draw the new districts, which limited the population that they could move. There are very few counties in the new majority-black districts that were not in the old ones, and vice versa. And the black population in many of the *majority-white* districts also stayed almost exactly the same. If a new district follows the lines of the old one, then it will contain the same people.

C. The district court also found that the drafters did not preserve the black population in some majority-white "influence" districts because of race-neutral criteria. The plaintiffs have done nothing to show that these districts were altered because of a "quota" or "policy." The plaintiffs' proposed plans reduce many of these districts' black populations as well. These changes are also explained, on a statewide level, by: (1) partisanship and (2) the requests of incumbent legislators. The Republican drafters had no reason to preserve black populations in districts that had been gerrymandered to elect white Democrats.

D. The district court also found that race-neutral criteria led to the county- and precinct-splitting that the plaintiffs criticize. The plaintiffs' own expert attributed this splitting to the 2% deviation. There are also good reasons to split precincts and counties—such as following municipal lines and former district lines. Although the plaintiffs produced an exhibit that identifies every precinct and county split, they have never identified any that they believe to have been split on the basis of race.

E. The district court also found that DOJ preclearance undermined the plaintiffs' statewide claims. The DOJ expressly considered whether "minorities are over concentrated in one or more districts," and the plaintiffs made the same statewide packing claims to DOJ that they are making here. DOJ preclearance indicates that the population percentages in the majority-black districts are mostly explained by the application of race-neutral criteria to concentrated black populations.

F. Finally, the four senate districts that the ADC challenged in the district court are not best explained by the drafters' purported "quota" or "policy." SD 7 and SD 11 are majority-white districts that do not even border majority-black districts, so their black population could not have been reduced to comply with a "policy" or "quota" for majority-black districts. Similarly, the only way to draw majority-white SD 22 with a higher black population is to split another district across Mobile Bay, which violates traditional redistricting criteria and was opposed by all the legislators in the area.

SD 26 is a majority-black district in Montgomery that has always been more than 70% black. The drafters preserved it as an urban district and its neighbor, SD 25, as a rural and suburban district. Because of consistent black populations in the City of Montgomery, this had the effect of raising the district's black population from 73% to 75%.

The district court did *not* find that districts of equal population could not be gerrymandered. It found that non-racial districting criteria, not the drafters' preclearance strategy, explain the aspects of

the plans that the plaintiffs dislike. This finding is amply supported by the record.

III. The district court was also correct that the ADC lacks standing to challenge the statewide plans. The ADC is making exactly the same arguments that this Court rejected in *United States v. Hays*. It has not brought a "*Shaw* claim" based on dignitary harms. And the harms that it alleges, such as precinct splits, are not "fairly traceable" to the "policy" it challenges. Moreover, the remedy that the ADC has requested—vacating the plans—will not redress the purported harms that the ADC has identified because it will not create more "integrated" districts. The ADC's dispute with these plans is political, not legal.

IV. The drafters' plans also meet rational basis and strict scrutiny. The drafters tried to avoid reducing the black population in preexisting majority-black districts as a strategy to comply with Section 5. They relied on the best evidence available to them to ensure that they did not "diminish" black voters' "ability to elect": the Democrat's redistricting practices, the views of black legislators, and the preexisting districts.

A. The drafters understood that their plans would be retrogressive if they "significantly" reduced the black population in majority-black districts. They did not want a district to "go[] from 60 percent to 51 [percent] or something like that." The goal of the drafters' strategy was to avoid such reductions.

B. The drafters had a strong basis in evidence to avoid reducing black population in majority-black districts to prove that the plans did not have a retrogressive effect. The burden under Section 5 is on the state to prove that its plans do not retrogress. DOJ's regulations and the caselaw provide that, if a plan preserves a supermajority percentage of minority voters in a district, there is no need to evaluate other factors to determine "ability to elect." The drafters had no reason to turn the question of Section 5 compliance into a battle of experts. Their strategy is consistent with how the Democrats redistricted in 2001 and how other states redistricted in this cycle.

The drafters' strategy is also supported by the text of the 2006 amendments to Section 5. By overturning *Georgia v. Ashcroft*, Congress instructed the states to focus on the "comparative ability of a minority group to elect a candidate of choice" between the old and new plans. This language forbids changes that "diminish" safe districts by turning them into more competitive districts, just as much as it forbids changes that turn safe districts into hopeless districts. Alabama's preexisting districts were in the 50s, 60s, and 70s in black population. Any substantial drop in these numbers would necessarily "diminish" the districts by making them more competitive.

The drafters' strategy is also supported by the history of the Section 5 reauthorization. A law professor told Congress that its proposed statutory language would "lock into place minority districts in the south at populations" that he said would "not serve minority interests." But Congress expressly approved of redistricting plans that "maintained the black vot-

ing age population in the [] majority black districts ... at almost exactly their pre-existing levels."

C. The drafters' strategy also helped them prove that the plans were not motivated by a "discriminatory purpose," broadly defined. In 2006, Congress imposed the requirement that the state affirmatively disprove that its plans were motivated by a discriminatory purpose. In light of this change, the drafters were not free to drastically alter the majority-black districts, disregard the advice of black political leaders, flood majority-black districts with white voters, or create bare-majority black districts.

D. The Court should not require legislators to conduct a "functional analysis" for every majority-black district. That would increase the federalism costs of Section 5 and require the use of race in highly subjective ways. States should have the leeway to comply with Section 5 by reference to objective criteria. The plans are constitutional under any standard of review.

ARGUMENT

I. The plaintiffs' statewide claims fail as a matter of law.

As a preliminary matter, we agree with the United States that the plaintiffs cannot make a race-based districting claim to the plans as a whole. *See* U.S. Br. 15-20. *See also* Lawyers Comm. Br. 5-8, 16-26. We believe the right rule is that any harm from race-conscious redistricting only manifests itself when specific district boundaries are warped along racial lines. *See* U.S. Br. 17. The statewide challenges that the plaintiffs bring do not show that kind of

harm because they do not attempt to prove that race predominated with respect to the lines of any particular district. No judge in the lower court agreed with the plaintiffs' statewide theories, and for good reason.

A. The plaintiffs' theories equate the abstract goal of complying with the Voting Rights Act with an improper fixation on race.

The plaintiffs' theories rest on the notion that, whenever a non-lawyer state legislator testifies that he prioritized compliance with the Voting Rights Act as a general matter, race is *per se* the driving factor statewide. But, with respect to a plan overall, a drafter must always, in the abstract, prioritize compliance with the Voting Rights Act. This is not a confession to gerrymandering; it is a recognition that federal law is supreme.

That is one reason why this Court has always evaluated a claim of racial gerrymandering with a district-by-district approach. A plan does not warrant strict scrutiny unless "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without *a particular district*." *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (emphasis added). A plaintiff must introduce evidence about specific districts to show that "race predominated over legitimate districting considerations." *Bush v. Vera*, 517 U.S. 952, 965 (1996). As the United States explains, the Court has required plaintiffs to establish that race was predominant with respect to a specific district "even in the

presence of evidence that the plan drafters had overarching statewide goals relating to race." *See* U.S. Br. 16 (citing *Vera*, 517 U.S. at 965-75; *Miller*, 515 U.S. at 917; *Shaw v. Hunt*, 517 U.S. 899, 904-907 (1996); *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999)).

Only district-specific litigation can account for the practical and political complexities of balancing compliance with federal law with other objectives. Small "p" political factors—communities of interest, former district lines, municipal boundaries, county lines, residences of incumbents—can influence the configuration of a particular district even if race also has an impact. Indeed, when questioned about specific districts, the drafters of Alabama's plans invariably explained that consistency with their preclearance strategy was an added benefit of a district-specific decision that they also made for political and practical reasons. *See, e.g.*, J.A. 110 (various benefits of expanding SD 23 and 24 south instead of north or east); J.A. 25 (same).

Because "a State is permitted great flexibility in deciding how to comply" with the Voting Rights Act, compliance may not require a plan's drafters to make any specific decisions based predominantly on that goal. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 520 (2006) (Scalia, J., dissenting and concurring) ("LULAC"). For example, 213,000 people live in Birmingham and 73% of them are black. *See* App. 10a. Even though federal law requires that the City be divided into several compact majority-minority districts, it does not tell a plan's drafters where to draw the lines. And the drafters testified at trial that the dividing lines between these majority-black districts were extensively negotiated

by the area's legislators. *See, e.g.*, J.A. 76-77, 83. Although the Voting Rights Act may have had some bearing on the configuration of these districts, other factors were also at play that cannot be accounted for without district-by-district litigation.

In short, the Voting Rights Act *requires* state lawmakers to be race-conscious and to draw districts in which black voters can elect representatives of their choice. *See* NAACP Br. 8-11. If a statewide racial gerrymander can be proven by abstract statements like "priority is to be given to the Voting Rights Act," ALBC Br. 26, or "the Voting Rights Act . . . makes it almost impossible to keep all counties intact," ALBC Br. 44, then the Voting Rights Act is a trap for honest lawmakers.

B. Strict scrutiny is not meaningful on a statewide basis.

Moreover, the narrow-tailoring aspect of strict scrutiny is impossible to apply in a meaningful way to the kind of claim that the plaintiffs have made. This is so for two reasons.

First, there is no way to isolate the effect of the drafters' preclearance strategy. The plaintiffs argue that the drafters of these plans were wrong to comply with the Voting Rights Act by maintaining majority-black districts as they had been. We disagree, as explained in Part IV below. But, more importantly, it is undisputed that Section 5 required the drafters to maintain (1) the same number of majority-black districts as in the benchmark plan (2) with large enough black populations to elect the black population's can-

didate of choice. As the United States also notes, "there is a substantial chance that the obligations of Section 2 and Section 5 in Alabama's redistricting are coextensive." U.S. Br. 28.

There is no way to disentangle the effects of the purportedly improper motive—maintaining black population percentages—from proper motives on a statewide basis. The plaintiffs' briefs suggest that *every* mention of the Voting Rights Act in the drafters' testimony is a reference to black-population-percentages, which ignores the undisputed obligations that the Voting Rights Act imposed. *See, e.g*, ALBC Br. 44 (county-splitting); ALBC Br. 56 n. 97 (relative absence of 30% black districts). There are also scores of majority-white districts in the plans that the drafters' preclearance strategy could not have affected at all.

Second, even on the plaintiffs' theories, at least some of the majority-black districts have the right black population, regardless of how that population arrived there. The two groups of plaintiffs do not even agree on which districts pose a problem. The House districts that the ALBC criticizes as being too close to the "quota" are not, with two exceptions,[2] the same districts that the ADC criticizes as having "extremely high" black populations. *Compare* ALBC Br. 30 *with* ADC Br. 31.

HD 53 is the best example of a district that complies even with plaintiffs' view of Section 5. The ALBC criticizes the drafters' decision to move HD 53 from Birmingham to Huntsville while, at the same

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[2] The two exceptions are HD 67 and HD 55. We discuss HD 67 extensively below.

time, keeping its black population percentage close to 55%. But, because the black population skews younger than the population overall, the new, compact district in Huntsville contains a *bare majority* of black voters—something *the plaintiffs* say Section 5 requires. *See, e.g.*, J.A. 63-65 (plaintiffs' expert testifying that an ability-to-elect district must have at least 51% black voter age population). There are several other districts like this in the plans, such as HD 54, HD 84, and HD 85.

C. There is no judicial remedy.

There is also no appropriate judicial remedy for the statewide claims that the plaintiffs have brought. The ALBC's brief does not suggest any remedy at all. For example, the ALBC spends much of its brief criticizing the drafters' decision to resolve the underpopulation in Birmingham by dividing HD 53's population among the remaining districts. But this move also allowed the drafters to create a new majority-black district in Huntsville. The ALBC does not explain what should happen to this new majority-black district if it prevails.

The ADC argues that the plans should be invalidated in their entirety. But it solves nothing to invalidate a statewide plan for the reasons that the plaintiffs have raised. A state must have legislative districts. And, if a federal court undoes a plan as a racial gerrymander, it must be able to suggest ways in which the districts could be redrawn to eliminate the constitutional problem. Otherwise, there will be neither a court-ordered remedy nor any standard by which to evaluate a state-proposed remedy.

The plaintiffs' failure to identify a discrete remedy is an especially significant problem given the inherently legislative nature of redistricting. The Court has long recognized that "'reapportionment is primarily a matter for legislative consideration and determination.'" *White v. Weiser*, 412 U.S. 783, 794 (1973) (quoting *Reynolds*, 377 U.S. at 586)). It requires drawing sometimes arbitrary, "inconsistent, illogical, and ad hoc" lines between groups of voters. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)(plurality). *Accord id.* at 306-07 (Kennedy, J., concurring in the judgment) (noting "lack of comprehensive and neutral principles for drawing electoral boundaries"). Courts that become entangled in redistricting "risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 307 (Kennedy, J., concurring in the judgment). *See also LULAC*, 548 U.S. at 415-16 ("[A] lawful, legislatively enacted plan should be preferable to one drawn by the courts.").

The ADC's suggestion that the Court vacate the plans in their entirety is inconsistent with these principles. The Court has recognized that even a limited judicial districting remedy "represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. In the context of redistricting, therefore, lower courts must use legislative plans as the starting point, changing them only as necessary to remedy specific violations of federal law. *See Perry v. Perez*, 132 S. Ct. 934, 943-45 (2012) (per curiam) (criticizing district court's interim remedial plan for "unnecessarily ignor[ing] the State's plans in drawing certain individual districts").

Because the plaintiffs have not shown that race warped the lines of any specific district, there is no reason to believe that a court-drawn plan would create more "racial balance" overall. The Voting Rights Act does not require the creation of coalition, influence, or other non-majority-minority districts. *Bartlett v. Strickland*, 556 U.S. 1, 14-20 (2009). Nor does the Voting Rights Act require the state to maximize the political influence of a racial minority. *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994). A federal court would thus have "no basis" to "set out to create a minority coalition district" as part of a remedial plan, "rather than drawing a district that simply reflected population growth." *Perry*, 132 S. Ct. at 944. And, as we show in Part II below, similar black population percentages are likely in any plan because of the demographics of Alabama.

There is also no reason to believe that a legislative do-over would create greater racial balance or, more to the point, any additional districts in which black voters can combine with white voters to elect a white Democrat. The plaintiffs have not suggested how the drafters could meet their legitimate policy goals—foremost among them, consistency between the old and new districts and the 2% deviation—in a way that would create more "integrated" districts. Nor have the plaintiffs suggested why the (almost certainly) Republican majority in the next Legislature would propose altering the existing plans in a way that would help Democrats be elected. *Cf. Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (noting the "element of futility" inherent in any "judicial attempt to invalidate a law because of the bad motives of its

supporters"). A statewide do-over would put us, at most, in the same place we are now.

D. Section 2 already protects against the dilution of black voters' statewide influence.

Finally, Section 2 of the Voting Rights Act already protects against the dilution of minority influence by "packing" minority voters into too few districts. *See Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). There is thus no reason for the Court to address these statewide "packing" claims under new equal-protection theories.

The plaintiffs made a Section 2 "packing" claim in the district court. But it failed, in part, because the drafters' plans provide black voters proportional representation in the Legislature. *See De Grandy*, 512 U.S. at 1014 ("[W]e do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity"). According to the 2010 Census, the voting-age African-American population of Alabama is about 25% of the total voting-age population. The Senate plan creates 8 majority-black districts, or 22.9% of the total of 35, and the House plan creates 28 majority-black districts, or 26.7% of the total of 105. On the other hand, the plaintiffs' proposed plans "actually create fewer opportunities for black voters to elect the candidates of their choice." J.S. App. 112. Like their Section 2 claims, the plaintiffs' racial gerrymandering claims request that the Court maximize the number of Democratic districts, not ensure fairness for black voters.

* * *

Both groups of plaintiffs in this litigation rely on statewide theories that are inconsistent with this Court's caselaw. Except for the four Senate districts that the ADC challenged at trial, the plaintiffs "never identified" any districts that "they alleged were racially gerrymandered." J.S. App. 127. They did not introduce any evidence about specific districts. They did not propose, in their post-trial briefing, fact-findings about specific districts. Many of the districts they discuss in their briefs have never been addressed at any other point in this litigation. To the extent they have district-specific arguments, they have waived them. The district court crafted a fact-based response to the plaintiffs' scattershot allegations that race explains the statewide plans "as a whole." But it could also have rejected these shifting statewide claims as a matter of law.

II. The plaintiffs did not show that race was the predominant factor statewide or in any specific district.

If the Court wants to entertain the plaintiffs' claims that the plans are improperly motivated by race "over all," then those claims should be rejected. The district court gave the only response to the plaintiffs' statewide claim that the facts would allow. The district court found, as a factual matter, that racial considerations did not predominate statewide. J.S. App. 144. The dissenting judge similarly rejected

the plaintiffs' statewide claim but did not meaningfully engage with the claim as the plaintiffs formulated it, suggesting instead that the plaintiffs should have challenged specific districts. *See* J.S. App. 227.

In this section, we evaluate the record evidence to explain why the district court found that race was not the overriding factor statewide and, instead, suggested that the 2% deviation predominated. This finding was not the error that the plaintiffs and the United States believe it to be. Instead, it is a compelling explanation for the specific features of the drafters' statewide plans that the plaintiffs say they dislike. First, we compare the drafters' plans to the plaintiffs' competing plans, which all use a 10% instead of 2% deviation. Second, we discuss the similarities between the majority-black districts in the old and new plans, which are mostly explained by nonracial considerations as a statewide matter. Third, we address the reasons the drafters did not preserve majority-white "influence" districts as a statewide matter. Fourth, we discuss the county-splitting and precinct-splitting that the plaintiffs now say is an indication that race predominated statewide. Fifth, we discuss the significance of DOJ preclearance. Lastly, we apply this statewide discussion to the four specific Senate districts that the ADC plaintiffs challenged and about which there is actual district-specific evidence in the record. All of this evidence supports the district court's fact-finding that race did not predominate statewide or as to any specific district that the plaintiffs actually challenged.

A. The consistent difference between the Legislature's plans and the plaintiffs' competing plans is the standard of deviation, not the population of the majority-black districts.

The place to start in evaluating the district court's fact-finding is by comparing the Legislature's plans with competing plans that the plaintiffs proposed during the legislative process.[3] "In a case such as this one," a plaintiff "must show *at the least* that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and "that those districting alternatives would have brought about significantly greater racial balance." *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (emphasis added).

If the drafters' strategy to comply with Section 5 were the driving factor for the plans overall, it would be easy to prove: the plaintiffs would simply need to propose a plan that meets the drafters' race-neutral

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[3] These are plans proposed in the Legislature as alternatives to the Republicans' plan by members of the ALBC, such as Rep. McClammy, Rep. Knight, and Senator Sanders, and by Dr. Joe Reed, the head of the ADC. The ALBC cites APX 20-23, which include voting-age population statistics for the plans drafted by William Cooper and introduced by Rep. Knight in the House as HB16 and Senator Sanders in the Senate as SB5. ALBC Br. 10 & n.26. We instead use the total black population percentages in C-46 (Knight Plan) and C-47 (Sanders Plan) for ease of comparison with the other alternative plans, which lack voting-age statistics. *See* C-45 (McClammy House Plan), C-42 (ADC House Plan), C-48 (ADC Senate Plan). We refer to Dr. Reed's plans as "the ADC plans."

criteria. *See id.* But the plaintiffs have always refused to propose a plan that meets those criteria, especially the 2% deviation. Instead of race, the most consistent statewide difference between the plaintiffs' plans and the Legislature's plans is that none of the plaintiffs' proposed plans comply with the standard of population deviation that the Legislature adopted.

We have created the charts below, which compare the black population percentage in each majority-black House and Senate district under the various plans. Blank entries exist where the plan at issue does not create a majority-black district. A similar chart comparing the black population percentage in every district, both majority-black and majority-white, is in the appendix.

Comparison of black population percentages in majority-black House districts

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
19	61.25%	67.07%	67.01%	75.39%
32	60.05%	58.40%	56.68%	
49				62.65%
52	60.13%	62.27%	61.34%	54.07%
53	55.83%	62.00%	56.61%	55.86%
54	56.83%			58.72%
55	73.55%	62.92%	66.66%	64.03%
56	62.14%	61.06%	58.16%	54.02%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
57	68.47%	62.27%	61.89%	60.27%
58	72.76%	66.20%	76.98%	61.09%
59	76.72%	66.62%	64.85%	61.27%
60	67.68%	62.26%	65.38%	59.55%
67	69.15%	69.21%	68.63%	69.43%
68	64.56%	53.87%	55.19%	56.29%[4]
69	64.21%	57.56%	56.92%	57.62%
70	62.03%	61.18%	61.66%	57.21%
71	66.90%	60.42%	59.43%	54.45%
72	64.60%	60.37%	55.37%	56.25%
76	73.79%	75.62%	64.36%	83.58%[5]
77	67.04%	67.34%	62.31%	59.38%
78	69.99%	73.03%	74.21%	58.70%
82	62.14%	61.14%	57.22%	53.63%
83	57.52%	61.87%	55.99%	
84	52.35%	51.40%	52.00%	71.97%[6]
85	50.08%	47.96%	53.94%	54.21%

[4] Rep. Knight renumbered many of his districts, making comparison difficult. Where it is possible to identify a particular district in Knight's plan that covers the same geographical area as a district in the other plans, we have included the black population for that district and noted the new number. Rep. Knight renumbered HD 68 as HD 90.

[5] Rep. Knight renumbered HD 76 as HD 73.

[6] Rep. Knight renumbered HD 84 as HD88.

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
97	60.66%	63.00%	63.59%	57.19%
98	60.02%	60.22%	61.57%	63.75%
99	65.61%	62.92%	63.55%	57.98%
103	65.06%	62.08%	63.03%	62.45%[7]

Comparison of black population percentages in majority-black Senate districts

Senate District	Plan as Passed	Senator Sanders Plan	ADC Plan
18	59.10%	58.49%	61.32%
19	65.31%	65.30%	62.89%
20	63.15%	62.82%	65.10%
23	64.84%	57.75%	61.23%
24	63.22%	56.90%	60.43%
26	75.13%	71.28%	68.44%
28	59.83%	51.55%	60.38%
33	71.64%	71.83%	65.83%

If the drafters had the "predominant" statewide goal of "packing" districts with "supermajority percentages" of black persons, then we would expect to see stark differences between their plans and the plaintiffs' plans, which do not share that goal. But

[7] Rep. Knight renumbered HD 103 as HD101.

we do not. In the House plan, the Legislature's plan has 23 districts that are over 59% black; Rep. McClammy's plan has 22. The only real difference in the House is in the Birmingham districts (HD 52-60) because the plaintiffs' plans manipulate the area's black population to create a new 30% black district that could be won by a white Democrat (HD 54), eliminating a majority-black district from the statewide plan.

The ADC says it is frustrated by the "staggeringly high black populations" in the drafters' majority-black districts, "including many in the 70-77% range." ADC Br. 2-3. But most of the Legislature's majority-black districts are similar to the ADC's. The ADC's plan provides for 2 House districts with black population percentages above 70%; the Legislature's plan has 4. In eight of the majority-black House districts, the ADC's proposed plan has a higher black-population percentage than the Legislature's. (HD 19, 52, 53, 58, 78, 85, 97, 98). In the Senate, all of the ADC's proposed majority-black districts are more than 60% black.

Moreover, some of the largest racial differences between the plans are directly traceable to non-racial criteria. The ADC drew SD 33 as 65.83% black instead of 72% black only because it split Mobile and Baldwin Counties and extended SD 34 across a large body of water, Mobile Bay. *See* J.A. 201 (ADC's map). The ALBC's brief also suggests splitting these counties across Mobile Bay to lower SD 33's black population percentage. *See* ALBC Br. 10 & n.28. Similarly, in the House, the ADC's efforts to manipulate the black population percentages across the southern middle of the state led it to change a host of districts

from how they were under the 2001 plan. *See* J.A. 202 (ADC's map). For example, HD 68 is in a completely new location on the border of Mississippi instead of in Monroe and Conecuh counties. *See* J.A. 202 (ADC's map), 194(2001 map).

Rep. Knight's House plan and Senator Sanders' Senate plan were drawn by the plaintiffs' expert William Cooper "to split as few counties as possible." *See* Tr. 2.111. These plans put incumbent legislators in the same districts. *See id.* Rep. Knight's plan changes the existing House districts so much that it is difficult even to identify which districts in his plan correspond to the districts in the other plans. Nonetheless, the black population percentages in Rep. Knight's majority-black districts go as high as 83% in Montgomery and are similar to those in the drafters' plan in many of the majority-black House districts. Senator Sanders' Senate plan is almost exactly the same as the drafters' in four of the eight districts (18, 29, 20, 33).

The greatest and most consistent statewide difference between the drafters' plans and the competing plans is the standard of deviation, not the racial composition of majority-black districts. As the district court explained, the reason the plaintiffs have never proposed a 2% plan is self-evident: the 2% deviation necessarily "eliminated the partisan gerrymander that existed in the former districts." J.S. App. 146. The plaintiffs' plans instead use a more forgiving 10% deviation that allows them to manipulate district lines to help elect the maximum number of white Democrats. At trial, the ADC's chairman personally asked the district court, as a remedy, to order the Republicans to draw new plans, "fol-

low[ing] their own rules, except for this one person—this plus or minus one" percent. Tr. 2.172.

B. The majority-black districts are similar between the old and new plans mostly because of nonracial factors.

Because the plaintiffs never proposed a plan that meets the drafters' race-neutral districting criteria, they have no counterproposal to show that race was the driving force for the drafters' plans "over all." Instead, the plaintiffs cite the consistency with which the drafters kept the racial percentages of the majority-black districts roughly the same. *See* ALBC Br. 30-33. And, even then, the plaintiffs cherry-pick the districts that they discuss, ignoring those districts with significant variations between the old and new plans. *See id.* 30-41, 49-53. This method of attempting to show that race was the driving factor in the state overall, or in any particular district, has serious flaws. As the United States notes, "some majority-black districts deviated significantly from the goal of maintaining the same percentage of black residents," and "in some districts the percentage of black residents may have remained relatively constant based on boundaries drawn in a manner consistent with traditional districting principles." U.S. Br. 20-21. The district court expressly found that the application of race-neutral districting principles to fixed demographics explains most of the similarity between the old and new majority-black districts. J.S. App. 143-44.

1. The similarities between the old and new districts are mostly explained by demographic reality.

From reading the plaintiffs' briefs, one gets the misimpression that black population is spread evenly throughout Alabama. In fact, many areas of Alabama have almost no black population. *See* App. 7a-9a (showing black population in each county). Instead, the black population is concentrated around the City of Birmingham and in counties across the middle and southern sections of the state. These counties include Greene (81.8% black), Sumter (75.2% black), Perry (69.0% black), Dallas (70.0% black), Wilcox (72.8% black), Lowndes (73.9% black), Montgomery (55.4% black), Macon (83.5% black), and Bullock (70.6% black). App. 7a. Likewise, the City of Birmingham is 73.4% black. App. 10a-11a. And Birmingham's western suburbs have similar populations, such as Bessemer (71.2% black), Fairfield (94.6% black), and Midfield (81.6% black). App. 10a. The population of these areas did not change just because district lines were shifted.

Because "[v]oters are not fungible commodities that can be moved anywhere in a state," the district court explained that the majority-black districts mostly reflect "racial groups tied to particular geographical locations." J.S. App. 145. This demographic reality explains why the black populations of some of the *plaintiffs'* proposed districts are similar to the drafters' purported "quota." The black populations of several of the ADC's proposed districts are only one percentage point away from the "quota," including HD 53 (0.90 difference), HD 58 (0.88 difference), HD

67 (0.51 difference), HD 70 (0.17 difference), HD 78 (0.05 difference), HD 82 (0.09 difference), HD 83 (0.93 difference), HD 84 (1.39 difference), SD 18 (1.4 difference), and SD 33 (0.98 difference).[8] ALBC Br. 5a-7a; *supra* 34-36. Senator Sanders' plan for SD 28 is only 0.57 above the "quota" of the 2010 numbers in the 2001 lines (51.55 compared to 50.98), making him much closer to the "quota" than the Legislature's plan (59.83). *Id.*

The district court was making the same point when it compared the demographics of the 2001 districts, using 2001 figures, to the demographics of the new districts, using 2010 figures. J.S. App. 46-56. The court used the comparison to illustrate that "the percentages of the black voting-age populations in the majority-black districts . . . remain relatively constant" over time. J.S. App. 182. Although the ALBC argues that this comparison was an error, the comparison is not based on the "wrong table." ALBC Br. 36-37. The district court was simply making a point that the ALBC does not appreciate: the black population figures in the Legislature's plans were mostly determined by historical residential patterns.

In fact, the percentage of black population in these districts has been stable ever since the court-ordered plan in 1993. J.S. App. 21, 46. Although population has increased in some areas and declined in others, the racial demographics of these areas have not changed.

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[8] These are comparisons between the figures in the ADC plan and the "quota" for each district in the appendix to the ALBC brief. As we have explained already, *supra* 9 n.1, the figures are a little different if one uses the chart in the Joint Appendix.

2. The similarities between the old and new districts are also explained by the drafters' race-neutral goal of changing every district "as little as possible."

The drafters' race-neutral districting criteria also worked to keep the demographics of the districts roughly the same. Changing all the districts "as little as possible" was an express goal. The drafters also wanted to preserve the cores of districts and prevent incumbents from having to run against each other. The Court has recognized that these goals are an important part of redistricting. *See Vera*, 517 U.S. at 977 ("maintaining communities of interest and traditional boundaries"). In fact, most *court-drawn* plans are also "least-change" plans that preserve as much as possible from the most recent plan. *See* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1161 (2005).

The record includes exhibits that break down each district by county and identify the number of people in each portion of a county within each district. DX 408 (2001 Senate), DX 401 (2012 Senate), DX 412 (2001 House), DX 404 (2012 House). The old majority-black Senate districts covered all or part of 24 counties. DX 408. Only two of those counties are no longer part of those districts. *Compare* DX 408 *with* DX 401. And, of the 26 counties included in the new majority-black Senate districts, only 4 were not already part of a majority-black district under the old plan. *Compare* DX 401 with DX 408. Only 1% of the people in the old majority-black districts live in

counties that are no longer part of those districts in the new plan. *Compare* DX 408 *with* DX 401. And only 5% of the people in the new majority-black districts live in counties that were not part of the districts in the old plan. *Compare* DX 401 *with* DX 408.[9]

And a comparison of the House districts shows an even smaller difference between the counties in the old and new plans. The new majority-black House districts encompass the same counties involved in the old districts. *Compare* Exh. 404 *with* Exh. 412. The new majority-black districts extend to parts of only four additional counties, and the population from those counties is only 1% of the total population in the new majority-minority districts. *Compare* Exh. 404 *with* Exh. 412.[10]

The district court explained that "more than 90 percent of the total black population remained in the same kind of district where they had resided earlier." J.S. App. 151. A cursory glance at the statewide

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[9] A comparison of DX 408 and DX 401 reveals that only Autauga and Bibb Counties were part of the majority-black Senate districts in 2001 but not 2012. In 2001, those counties contributed a total of 10,480 people, or 1%, of the 992,983 people in the 2001 majority-black Senate districts. DX 408. A similar comparison reveals that only Butler, Washington, Pickens, and Houston Counties were part of the majority-black districts in 2012 but not 2001. *Compare* DX 408 *with* DX 401. In 2012, those counties contributed a total of 53,613, or 5%, of the 1,089,323 people in the 2012 majority-black Senate districts.

[10] A comparison of DX 404 and 412 reveals that only Baldwin, Washington, Pickens, and Tallapoosa Counties were part of the majority-black House districts in 2012 but not 2001. In 2012, these counties contributed a total of 13,020 people, or 1%, of the total 1,269,931 people in the 2012 majority-black House districts. DX 404.

maps confirms the import of these statistics: the new House and Senate districts look substantially similar to the old districts and share the same unusual features. J.A. 191-94. Even within each county, the old and new districts occupy close to the "same space." J.A. 81.

The goal of changing each district "as little as possible" likely explains why the racial percentages of many of the *majority-white districts* are substantially the same between the old and new plans. The drafters had no goal to preserve black populations in majority-white districts, but the racial percentages in many of the majority-white House districts are almost identical between the old and new plans nonetheless:

Comparison of black population percentage in selected majority-white House Districts under old and new plans[11]

House Districts	2010 Black Population in New Districts	2010 Black Population in Old District Lines
10	16.18%	16.22%
16	10.38%	10.73%
22	5.74%	5.78%
25	15.99%	16.17%
35	16.08%	15.45%
41	11.97%	10.92%

[11] Figures for the new districts come from App. 1a-4a. Figures for the 2010 black population in old district lines come from our exhibits. *See* DX 406.

House Districts	2010 Black Population in New Districts	2010 Black Population in Old District Lines
49	12.92%	11.92%
66	25.16%	27.26%
75	26.43%	27.61%
89	32.00%	32.53%
90	34.65%	35.54%
93	17.11%	17.83%
104	15.79%	15.35%

The black population percentage of these majority-white districts remained the same, despite the fact that the drafters had to depopulate them by as much as 10.43% (HD 10), 42.68% (HD 25), 60.76% (HD 41), and 32.11% (HD 75). DX 406.

Because the drafters "used existing House and Senate districts to draw the new district lines," their "choice of which voters to add or subtract from each district was limited by which populations abutted the existing districts." J.S. App. 145-46. This limitation worked to keep the black population percentages the same in the majority-black districts far more than any focus on race. If the Legislature draws a new district in the same geographical area as the old one, it will contain the same or similar people. This is logic, not race-based districting. *See* Lawyers Comm. Br. 20-21.

3. Changes to the majority-black districts were consistent with other race-neutral principles.

The district court also explained that, when the drafters changed majority-black districts, they did so based on race-neutral redistricting criteria. J.S. App. 142-143. SD 23 changed to end the unnecessary splits of Lowndes, Perry, and Autauga counties. *Compare* J.A. 191 with J.A. 192. SD 26 contracted from the sparsely populated rural areas south and east of the City of Montgomery and became a more compact, urban district.

The ALBC argues that the drafters' decision to move HD 53 from Birmingham violated traditional redistricting criteria. But the drafters intentionally chose to consume the district of an older representative, who was in poor health and who they believed would not run again.[12] APX 75 at 132:9-14 (Hinaman Depo.). This decision also allowed the redistricters to preserve the core and character of surrounding districts, which were under-populated by more than a full House district. The plaintiffs' plans also use the population of an under-populated majority-black House district to repopulate the other districts, but they create a majority-white "influence" district (HD 54) in Birmingham for the first time instead of a replacement majority-black district in Huntsville.

Race-neutral districting criteria also presumably explain why the racial composition of many of the plaintiffs' proposed districts is very similar to the

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[12] This representative, Demetrius Newton, later passed away.

drafters' districts, even where those percentages differ substantially from the former districts. For example, the black population percentages in new majority-black SD 19 and SD 20 are about 10 percentage points lower than they were in the old districts. But all three competing Senate plans draw these districts within a few percentage points of each other. *See supra* 34-36. Similarly, the ADC's plan for SD 28 is less than one percentage point different from the Legislature's, but both are about 10 percentage points higher than the old district. As the chart above shows, *supra* 34-36, the black population percentage in most of the majority-black districts is similar across the competing plans.

* * *

HD 67 is a House district that *both* plaintiffs discuss in their briefs. *Compare* ALBC Br. 30 *with* ADC Br. 31. But it is also the most obvious example of why the plaintiffs' focus on population statistics does not show that race predominated. HD 67 was a one-county district in the former plan, and it is essentially a one-county district in the new plan. DX 404, 412. That county, Dallas, has 43,820 people in it, which is only about 1,000 people short of an ideal House district. And 70% of the people in Dallas County are black. App. 7a. Any plan for HD 67 that does not seriously disrupt the district's prior lines will thus be around 70% black, whether or not race is a consideration.

But, even if a line-drawer did not share the drafters' concern with continuity between the old and new plans, HD 67's black population would be almost im-

possible to change because of demography. Almost all of the counties that surround Dallas County are also 70% black, *see supra* at 2, which makes it highly improbable that anyone would draw a district with a meaningfully different black population percentage regardless of the neutral principles he or she applied. Contrary to the dissent's declaration that "[o]ne factor and one factor alone[:] . . . race" explains HD 67's black population percentage, it would have taken a gerrymander to *change* that district's racial demographics. J.S. App. 219. And, sure enough, HD 67 is 69% black in *every* proposed plan. *See* App. 3a.

The plaintiffs have not introduced any evidence to show that the similarities between all, most, or even many of the old and new districts are explained by a "quota" or "policy" instead of the application of race-neutral districting criteria to the unchanged demographics of Alabama.

C. Nonracial considerations changed the "white Democratic districts."

The district court's finding that race did not predominate is also supported by evaluating majority-white "influence" districts. In the court below, the plaintiffs and their witnesses argued that the plans were predominantly motivated by race because they reduced the black population in "white Democratic districts." J.A. 116. The plaintiffs now refer to these districts in more anodyne terms: "districts in which blacks had been between 30% and 50% of the population," ALBC Br. 9, and "inter-racial coalition districts," ADC Br. 17. But they still mean "white Democratic districts."

The plaintiffs have never shown that these majority-white districts were changed because of a "quota" or "policy" for the majority-black districts. We address the three Senate "influence" districts that the ADC challenged in Section F below. The plaintiffs also complain that the drafters reduced the black population below 30% in six House "influence" districts.[13] *See* ALBC Br. 9; ADC Br. 17-18. But so did many of the competing plans. No proposed plan preserves HD 45 or HD 61 as districts with more than 30% black population. *See* App. 2a, 3a. And only one of the three competing House plans preserves HD 6, HD 38, HD 73, or HD 74 as 30% black "influence" districts. *See* App. 1a-3a. Moreover, the drafters clearly dropped the black percentage of HD 6 because they created a *new* majority-black district in the Huntsville area (HD 53), not because they were preserving the population of an existing district. The black population of the only preexisting majority-black district in the area, HD 19, declined from 69% to 61%. *See* ALBC Br. App. 5a.

The district court gave two main answers for why the drafters did not maintain preexisting levels of black population in "white Democratic districts" on a statewide basis. *See* J.S. App. 142. The plaintiffs have not even addressed these answers, much less refuted them.

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[13] The plaintiffs do not explain why they use 30% (ALBC) and 29% (ADC) as the cutoff.

1. Partisanship

The district court's main answer for why the drafters did not preserve or create "white Democratic districts" was partisanship. J.S. App. 161. That answer is obviously correct. "[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." *Cromartie*, 526 U.S. at 551. Here, the plaintiffs' expert testified that "[b]lacks vote overwhelmingly 90 percent or more for Democrats, and everybody in Alabama knows that." J.A. 118. In fact, according to the same plaintiffs' expert, "[t]he major way that you know how a precinct has voted in most of Alabama is the percentage of blacks in that precinct." J.A. 118.

Although the drafters of these plans denied that they had any systematic goal to eliminate Democrats, they also consistently testified that they had to craft plans that would pass the Legislature. *See* App. 27-28; *see also* J.S. App. 46. The Legislature was controlled by Republicans, and these plans were passed on party-line votes. J.S. App. 59, 161. Faced with a choice between removing voters from Republican-controlled districts to repopulate the majority-black districts or removing Democratic voters from "white Democratic districts," the Republican drafters understandably chose the latter option. As the district court explained, "under the new plans, the number of Republicans in the Alabama House would likely increase from 66 representatives to 68 to 70 representatives and that the number of Republicans in the

Senate would increase from 22 senators to 23 to 25." J.S. App. 101.

To be clear, we are not suggesting that partisanship drove the plans overall, only that the Republican drafters had no reason to preserve or increase the black population in "white Democratic districts" as they equalized population between the districts. Partisanship explains why the drafters were content to solve Montgomery's under-population problem by moving Democrat-controlled HD 73 to Republican Shelby County. And partisanship explains why the drafters solved the under-population problem in Birmingham by moving HD 53 to Huntsville, instead of gerrymandering a "white Democratic district" in the Birmingham area as the competing plans suggest. As one Senator from Birmingham testified, this decision ensured that "the county would be controlled by the people in [the Republican] party." J.A. 43.

2. Incumbent preferences

Similarly, the district court explained that the drafters removed black population from "white Democratic districts" in ways that incumbent legislators wanted. *See* J.S. App. 142, 158, 167. Sen. Dial testified that he wanted to make the redistricting process "more transparent" than it had been in the past, with input from other legislators about how they wanted their districts changed. J.A. 21, 25-28. Rep. McClendon likewise offered to meet with each representative and worked with those who brought plans or concerns to him. J.A. 99-100 (Mobile), J.A. 100-01 (McClammy in Montgomery); *see also* Tr. 3.120-21.

For this reason, black legislators had an outsize influence in how their own districts were repopulated. They universally requested that their districts be repopulated in ways that maintained or increased the black population at the expense of "white Democratic districts." For example, Senator Sanders of SD 23 suggested repopulating his district by taking all of Lowndes County (73.9% black) instead of Autauga County (18.3% black). J.A. 24-26; App. 7a-8a. And HD 73 was moved from Montgomery because black legislators from the Montgomery area wanted to expand the borders of their under-populated districts to consume all of HD 73's population. J.S. App. 35.

There is no evidence that black legislators were focused on race when they made these suggestions. Instead, it is much more likely that these legislators wanted to repopulate their districts with communities of interest that were demographically, economically, and politically similar to the communities that they already represented. The effect was to put contiguous black communities together in the same district, instead of splitting them between districts as in the Democrats' 2001 gerrymander.

D. County and precinct splits are better explained by the need to equalize population than by racial considerations.

The plaintiffs argue that the county and precinct splits in the drafters' plans are an indication that the drafters' foremost concern was race. But, as the district court explained, there are several factual problems with this theory.

The first is that the plaintiffs' own expert, William Cooper, attributed the raw amount of county and precinct splitting to the 2% deviation, not race. His report, Doc. 125-11, attests that the 2% deviation "forced the legislature to subordinate traditional redistricting principles such as avoidance of county and precinct splits." Doc. 125-11 ¶6. The report explains in detail how the 2% deviation makes it impossible to keep many precincts and counties whole. *See* Doc. 125-11. A tight population deviation means that there will often be counties and precincts at the edges of districts that must be split so that the right amount of population gets placed into each adjoining district.[14] *See also* ALBC J.S. 38 (complaining that the 2% deviation "systemically increased the instances in which" counties were split).

Another problem with the plaintiffs' argument is that there are many good reasons to *want* to split precincts and counties. As the plaintiffs' expert explains in his report, precinct splits are often necessary to follow roads or municipal boundaries. *See* Doc. 125-11. The plaintiffs' expert explained that "[m]any precincts in Alabama split municipal boundaries, so if precinct splits are minimized[,] . . . it is difficult to avoid numerous municipal splits regardless of the deviation range." Doc. 125-11 ¶16 n.4. And, of course, the drafters had to *preserve* previous precinct and county splits to keep the new districts

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[14] For example, under a 2% deviation, a 5,000 person precinct cannot be added to a House district that already has 43,000 people. That would put the district over the limit. But the precinct also cannot be left out of the district entirely, because that would keep the district under the population deviation. Instead, the precinct must be split.

in the same locations as the old ones. The district court explained that "the districts adopted in 2001 had a similar number of precinct splits as the [new] Acts." J.S. App. 89.

A third problem with the plaintiffs' reliance on precinct splits to show a racial motivation is that the plaintiffs have never identified any specific precinct that they allege was split because of race. There was no "testimony at trial that majority-black districts incurred more precinct splits." J.S. App. 155. The only trial exhibit on precinct splitting "shows high concentrations of precinct splitting in 26 counties composed exclusively of majority-white House and Senate districts." J.S. App. 155. The exhibit also shows that "the Legislature split zero precincts" in many majority-black areas. J.S. App. 155. In other words, the only evidence on this point is that "precinct splits occurred throughout the State" for a variety of reasons. J.S. App. 155. Even though the plaintiffs produced an exhibit that identifies every precinct split, they have never pointed to one and said, "this precinct was split because of race."

Similarly, the plaintiffs failed to show, or even allege, that any particular counties were split because of race. The only county split that the plaintiffs discuss in their briefing as purportedly being racially motivated is the expansion of HD 69 into Montgomery County.[15] *See* ALBC Br. 44. But the political consultant testified that he expanded HD 69 in Mont-

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[15] The plaintiffs say that two county splits resulted from what they say was the racially motivated decision to move HD 53, but they do not say that the drafters intentionally split the county because of race. *See* ALBC Br.45 & n.80.

gomery because he needed population—not black population, just *population*—to bring that underpopulated district up to deviation. *See* APX 75 at 94:11-17. The maps support this testimony. HD 69 took up all of Wilcox and Lowndes counties and part of Autauga County in the old plan. It is almost exactly the same in the current plan, *except* that it expanded into Montgomery County to pick up additional population. *Compare* J.A. 193 *with* J.A. 194.

We concede that the political consultant who drew the maps testified that he *may* have split *some* precincts and counties *somewhere* on the basis of race. There are 36 majority-black districts between these two plans, some of which are barely majority black. This testimony—that some precincts and counties somewhere may have been split because of race—is not evidence that race "predominated" with respect to the plans "over all."

E. DOJ rejected the plaintiffs' statewide arguments when it precleared the plans.

The district court also reasoned that DOJ preclearance undermined the plaintiffs' statewide gerrymandering claims. *See* J.S. App. 162-63, 183. DOJ's regulations say that, in making the preclearance determination, it expressly considered whether "minorities are over concentrated in one or more districts" and whether "the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial

boundaries." 28 C.F.R. § 51.59(a)(4) & (6). This inquiry gave "particular attention . . . to[] the requirements of the 14th, 15th, and 24th Amendments to the Constitution." 28 C.F.R. § 51.55(a). The plaintiffs made the same arguments about statewide "packing" to *DOJ*, and DOJ necessarily rejected those arguments when it precleared these plans. J.S. App. 162-63.

To be clear, we agree with the United States that DOJ did not determine that *no* district was racially gerrymandered. *See* U.S. Br. 7 n.1. That would take the kind of district-by-district analysis that the United States proposes in its brief. But the fact that DOJ precleared these plans is good evidence that—on a statewide basis—"minorities are [not] over concentrated" in the majority-black districts. DOJ preclearance suggests that the racial percentages in the majority-black districts are mostly explained by race-neutral districting criteria.

F. The plaintiffs did not establish that race predominated as to any of the four Senate districts the ADC challenged in the district court.

In addition to finding that race did not predominant "over all," the district court evaluated the four specific Senate districts that it believed the ADC had challenged and found that those districts were also not predominantly motivated by racial purposes. *See* J.S. App. 39-40, 61-62, 70-74, 79-81, 140, 166-173. These districts are SD 7, SD 11, SD 22, and SD 26. Only one of these districts, SD 26, is a majority-black district.

The plaintiffs do not contest the district court's reasoning about these districts, they do not make district-specific claims about these districts, and they have not attempted to prove their standing to bring *Shaw* claims with respect to these districts. Nonetheless, they do mention these four Senate districts as part of their statewide challenges to the Senate plan, so we address them here.

1. SD 7 and SD 11

SD 7 is in Huntsville, and SD 11 is east of Birmingham. The plaintiffs claim that SD 7 and SD 11 were purported influence districts in the old plan, even though they were represented by white Republicans. The plaintiffs suggest, without analysis, that the black population in SD 7 and SD 11 was reduced because of the drafters' "quota" or "policy" for the majority-black districts. *See* ALBC Br. 7-9; ADC Br. 18. But that contention is obviously wrong because SD 7 and SD 11 do not border any majority-black districts.

The closest majority-black districts to SD 7 and SD 11 are miles away in Birmingham. Two of those majority-black districts (SD 19 & SD 20) are 10% and 14% *below* their purported "quota." *See* ALBC Br. App. 7a. And every competing plan puts the same percentage of black persons in those Birmingham-area Senate districts—between 60% and 65%. *See supra* 36. The black population in SD 7 and SD 11 was not "siphoned out" and "moved into black-

majority districts" to meet a "quota" or "policy."[16] ADC Br. 17.

2. SD 22

SD 22 is a majority-white district located in the south of Alabama that was represented by a white Democrat. It bordered majority-black districts to the north, but it moved further south into a majority-white area. The district court found that the main reason SD 22 moved south is that it had to take population from an over-populated majority-white district (SD 32) wedged between SD 22, the Gulf of Mexico, Mobile Bay, and the State of Florida. *See* J.S. App. 170-71; J.A. 110. As the district court explained, there was literally nowhere else in Alabama for that excess population to go without crossing a body of water. J.S. App. 169-70.

The only competing plan with different racial percentages in this area is the ADC's plan, which sends a Senate district stretching across Mobile Bay. *See supra* 37; J.A. 201. All of the legislators from this area opposed extending a district across Mobile Bay, and such a district violates traditional redistricting criteria in any event. J.S. App. 170-71. Moreover, as between the two plans that did not extend a district across this large body of water, the drafters' plan for majority-white SD 22 actually has a slightly *higher* black population (21.52%) than Senator Sanders'

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[16] A much better explanation for the way SD 11 was drawn can be inferred from the fact that a co-chair of the redistricting committee, Rep. McClendon, is the present Republican nominee for the Senate seat.

Senate plan (20.43%). *See* App. 6a. There is no reason to believe that the black population in majority-white SD 22 is best explained by a "quota" or "policy" for the majority-black districts.

3. SD 26

SD 26 is a majority-black district. The drafters preserved SD 26 as a district centered on the City of Montgomery, and its neighbor SD 25 as a predominantly suburban and rural district. To accomplish this, the political consultant explained that he moved "some precincts in the city of Montgomery" into under-populated SD 26 and out of over-populated SD 25. *See* J.A. 77. He also "took some of the rural parts of Montgomery County and put those into Senate District 25" to "connect up to Crenshaw County," which had been part of former SD 30. Tr. 3.129-30. The rural areas that were moved out of SD 26 and into SD 25 contained only 12,000 people. Tr. 3.130, 176. (An ideal Senate district is 136,564 people. Tr. 2.86.)

The "precincts in the City of Montgomery" that the political consultant moved into SD 26 to repopulate it were predominantly black because of the demographics of the City of Montgomery. According to a plaintiff who was deposed in this litigation, the "west side" of Montgomery where SD 26 has always been is "about 98 percent black." *See* Doc. 125-8 at 17:20-23 (Jiles Williams Depo.). One reason SD 26 was under-populated is that this black population had been expanding into other parts of Montgomery. Another plaintiff testified that there has been "a steady growth of black population" in the rest of the

City of Montgomery over the last ten years. Tr. 2.181 (Lynn Pettway). Although the rest of Montgomery once was majority-white, it is "more blacks now than it is whites." Tr. 2.183. As the district court explained, the "slight percentage increase of the black population in District 26 does not evidence gerrymandering of black voters; instead, it evidences consistent concentrations of black population in the City of Montgomery." J.S. App. 153.

The plaintiffs say that the drafters split precincts between SD 25 and SD 26 along racial lines, but they have never identified any precinct that they allege was split because of race. Instead, this assertion is based on the off-hand remark of SD 26's incumbent legislator, which the district court did not credit.[17] For their part, the drafters testified that they repopulated SD 26 by "put[ting] some precincts back together" that had been split in 2001, Tr. 3.183 (Hinaman testimony), and split other precincts because "precinct lines don't necessarily follow roads and boundaries." Tr. 3.184.

SD 26 has been over 70% black since 1993. J.S. App. 153. The ALBC suggests that the drafters should have repopulated SD 26 with the 13,906 people in rural Crenshaw County, thereby bringing its

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[17] The district court explained that the legislator did not even know the racial composition of SD 26 under the new plan. J.S. App. 69-70. He testified that it was 71% black under the new plan, when it is actually 75% black. J.S. App. 70. Nor did he know the racial composition under the old plan. He suggested that 71% black was a "much higher" number than the district had previously been. J.A. 45. In fact, of course, the district has always been higher than 70% black and was almost 73% black in 2010. J.S. App. 153.

black population percentage down to the high 60s. ALBC Br. 49. But only someone intent on *committing* a racial gerrymander would think to add a rural county to a district centered on the urban core of the City of Montgomery. If joining Crenshaw County to SD 26 were the "obvious solution," ALBC Br. 49, then the drafters of alternative statewide plans would have used it. But the plaintiffs' plans put Crenshaw County in SD 31 instead. *See* J.A. 201 (ADC map), C 47 (Sanders map).

The ALBC also points to the shape of SD 26 as evidence of a gerrymander, comparing it to a giant sand fiddler crab. ALBC Br. 52. But the core of SD 26's shape is the west side of the City of Montgomery, and that shape was developed in 2001. J.A. 197 (comparison maps of SD 26). The part of neighboring district SD 25 that reaches into SD 26 around Interstate 85 is nearly the same in the old and new plans. J.A. 197. This part of SD 25 is different only because the drafters moved some precincts on its borders into under-populated SD 26. The "crab claws" follow roads. J.A. 197.

Moreover, the alternative plans have similar black population percentages for SD 26, despite their use of a population deviation exceeding 2%. SD 26 in the ADC plan is 68.44% black and over-populated by 2.58%. C 48 at 1, 6. SD 26 in Senator Sanders' plan is 71.28% black, despite being under-populated by 3.77%. C 47 at 1, 6. The plaintiffs have not refuted the district court's express fact-finding that SD 26's racial composition is mostly explained by the application of race-neutral districting criteria to the demographics of the area.

* * *

After full discovery and a trial, the district court reasonably concluded that the plaintiffs failed to show that the drafters elevated considerations of race over other redistricting criteria on a statewide basis or with respect to any particular district in either the House or Senate plan. If the law allows the plaintiffs to bring a statewide racial gerrymandering claim, then they have failed to prove it.

The United States and the plaintiffs criticize the district court's reasoning about the predominance of the 2% deviation, but they are missing the point. The district court's point was *not* that districts of equal population can never be gerrymandered. The district court's point was that the 2% deviation makes it hard to manipulate districts for any purpose. J.S. App. 144-45. The district court's point was that the features of the statewide plans that the plaintiffs dislike—such as precinct splits—are mostly attributable to the 2% deviation. J.S. App. 156-58. The district court's point was that the consistent difference between the plaintiffs' plans and the drafters' plans is the 2% deviation. J.S. App. 146. The district court's point was that there is no way to use a 2% deviation, comply with traditional criteria, *and* create more "white Democratic districts." J.S. App. 146. The plaintiffs know all this, which is why they expressly challenged the 2% deviation below and in their jurisdictional statements.

We do not deny that the drafters' strategy to secure preclearance may have played a role in how some of Alabama's 140 districts were shaped. Our

only point is that the plaintiffs failed to prove that it played a significant role as to all the districts or any specific district. That is why the dissenting judge below could not say "that the plaintiffs should prevail as to all the districts" or confidently identify the specific districts as to which he thought the plaintiffs should prevail. *See* J.S. App. 227. The district court was right to reject the plaintiffs' racial gerrymandering claims.

III. The ADC lacks standing to challenge the plans on the grounds that it is challenging them.

In addition to being correct on the merits, the district court was correct that the ADC lacks standing to make the arguments that it is making. This Court requires that a plaintiff demonstrate (1) he has suffered an "injury in fact" that is "concrete and particularized;" and "not 'conjectural' or 'hypothetical'"; (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). The ADC did not establish any of these requirements in the district court, and it has not established any on appeal either.

A. The ADC has not been injured by the "fixed BPPs policy" that it is challenging.

The Court has recognized a single kind of cognizable harm caused by good-faith, race-based redistricting: the dignitary harm to the individual of being placed in a district on the basis of race, as opposed to other factors. A plaintiff challenging a district must "demonstrate that he or she, personally, has been injured" by a racial classification. *United States v. Hays*, 515 U.S. 737, 744 (1995). Because individual dignitary harm is the only recognized injury, the claim may be brought only to the extent that a person was injured "as a direct result of having *personally* been denied equal treatment." *Id.* at 746 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)).

The ALBC at least attempts to make its statewide claim fit within the *Shaw* framework. The ADC does not. Instead of identifying the kind of harm recognized in *Shaw* and *Hays*, the ADC's arguments rest on the disturbing proposition that "super-concentrated" majority-black districts are inherently harmful, while "integrated" majority-white districts are inherently beneficial. *See* Lawyers Comm. Br. 21. The district court was right to reject the ADC's standing to make this kind of claim.

1. The ADC focuses on generalized harms common to all people.

The ADC has never identified an individualized harm to itself or its members as the basis for stand-

ing. Instead, the ADC has always asserted that "[o]ur case is different" because it is based on "other sorts of harm" arising from "race-based redistricting." ADC J.S. 21.

The problem is that these "other sorts of harm" are merely "generalized grievance[s] against governmental conduct of which [the ADC] does not approve." *Hays*, 515 U.S. at 745. The ADC asserts a harm arising from the purported fact that "no level of government claims decision-making responsibility" for Alabama's districts. ADC Br. 2. The ADC asserts harm from the reduction in its influence in certain districts, which affects its "mission" of advancing its political interests. ADC Br. 55. The ADC complains that the Legislature's districts are "excessively[] segregated" as compared to the "integrated" districts the ADC says it prefers. ADC Br. 3.

These are precisely the generalized harms that this Court rejected as a basis for standing in *United States v. Hays*. In *Hays*, the Court explained that there is no "personal right to a government that does not deny equal protection of the laws." 515 U.S. at 744 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489-90 n.26 (1982)). The Court held that a plaintiff who lives in an allegedly racially gerrymandered district has standing to challenge the denial of equal treatment *only* because he or she has been personally subjected to a racial classification, which inflicts special dignitary harms. *Hays*, 515 U.S. at 745. But "where a plaintiff does not live in such a district, he or she does not suffer those special harms" and, therefore, lacks standing. *Id.*

The ADC's brief repeats verbatim the arguments that the plaintiffs unsuccessfully made in *Hays*. In *Hays*, the plaintiffs argued that it was dispositive for their standing that they were challenging the plan "in its entirety" instead of any district "in isolation." *Id.* at 746. Here, the ADC argues that it is dispositive that it "challenge[s] not one district in isolation, but a statewide policy." ADC Br. 57. In *Hays*, the plaintiffs argued that they had standing to challenge districts because "the racial composition of [one district] would have been different if the legislature had drawn [a neighboring district] in another way." 515 U.S. at 745. Here, the ADC argues that it has standing because the drafters' view of Section 5 "necessarily affect[ed] other districts . . . like a domino." ADC Br. 57. This Court unanimously rejected these arguments in *Hays*, and it should reject them again now.

2. To the extent the ADC alleges specific harms to itself or its members, it has not shown that those harms are "fairly traceable" to the policy that it challenges.

As we have explained above, on this record, it is impossible to say that the drafters' preclearance strategy had a definitive effect on the plans over all. *See also* U.S. Br. at 20-21. Nonetheless, the ADC attempts to assert three kinds of harms purportedly arising from the "fixed BPPS policy." Even assuming that these are cognizable harms under *Hays*, they are not "fairly traceable" to the drafters' so-called "policy."

First, the ADC says that plaintiff Stallworth "resides in proposed HD 77," so she "has standing to challenge the application of the State's policy to her district at least." ADC Br. 52. But HD 77 was a district that the drafters *dropped* from 73.52% black to 67.04% black. *See* ALBC Br. App. 5a. The ADC has identified no reason to believe that the drafters' preclearance strategy explains why they drew HD 76 in the way that they did.

Second, the ADC says that the drafters' "policy" "result[ed] in new, confusing precinct reassignments that often require citizens in a single county to cast ballots in different precincts for State House and Senate races." ADC Br. 56. But, as we have explained above, this harm—to the extent it is not a generalized grievance shared by every voter—is not traceable to the "fixed BPPs policy" that the ADC challenges. The 2% deviation—which the ADC does not now challenge—is what caused this precinct and county splitting. That was the testimony of the plaintiffs' expert. And it is why the ADC's chairman personally asked the district court to order the Republicans to draw new plans "follow[ing] their own rules, except for this one person—this plus or minus one" percent. Tr. 2.172.

Finally, the ADC argues that it has representational standing because, contrary to the district court's finding, the ADC has members in every district. ADC Br. 58-61. There are at least two problems with this argument. The first is that the ADC never established this fact below. The ADC claims that the trial court decided the issue *sua sponte*, but the defendants challenged the ADC's standing well before trial. *See* J.A. 204, 205, 208. The briefing below in-

cluded an argument that the "Newton Plaintiffs" (which are now the ADC plaintiffs) lacked standing to challenge a legislative district because none of the individual plaintiffs lived in that district. *See* J.A. 205 (citing *Hays*, 515 U.S. 737). The defendants argued further that "the claim asserted requires the participation of the individual ADC members." J.A. 208. The defendants' position has always been that the plaintiffs must prove their standing under *Hays*.

The more important point, however, is that the ADC has never made a claim on behalf of its individual members. Instead, it has expressly disclaimed a "*Shaw* claim" that would be based on individualized harm to a member. *See* ADC Br. 55, 58. Whatever kind of claim the ADC is litigating, that claim is not a claim made on behalf of the ADC's individual members who live in the majority-black districts.

B. The purported injuries identified by the ADC are not redressible.

As explained above, there is also no remedy for the kind of statewide claim that the ADC has brought. *See supra* 27-30. The "excessively-segregated" districts that the ADC says it dislikes will not be redressed by vacating the plans.

The ADC's dispute with these plans is political, not legal. In the trial court, the ADC's chairman, Dr. Reed, testified that majority-black districts in Alabama should be at least 60% to 65% black to ensure that black voters can elect their candidate of choice. The district court expressly credited this testimony, calling Dr. Reed the "dean of Alabama redistricting."

J.S. App. 162, 165. But the ADC's brief does not mention this testimony, and instead asks the Court to adopt the contrary testimony of Dr. Allan Lichtman, a white political scientist from Bethesda, Maryland. His testimony was offered in support of the ADC's Section 2 claim that the drafters should have created even *more* majority-black districts.

This disparity—between what the ADC says it wants on appeal and what the ADC actually wants in practice—underscores why the Court decided *Hays* in the way it did. There will always be a political loser when new lines are drawn, and the Democratic Party was the political loser here. Although the ADC dislikes the Legislature's redistricting plans because they reduce the Democratic Party's influence, that generalized grievance does not create standing to sue.

IV. The plans meet rational basis and strict scrutiny.

The drafters had a strong basis in evidence for their efforts to comply with the Voting Rights Act. The plaintiffs have dropped their argument that Alabama's plans cannot be supported by Section 5 at all, and the United States persuasively explains why those arguments are wrong anyway. *See* U.S. Br. 28-33. There is no dispute that the drafters of Alabama's plans subjectively wanted to comply with federal law in good faith. There is no dispute that federal law required them to maintain at least the same number of majority-black districts under the 2012 plan as under the 2001 plan. *See, e.g.*, NAACP Br. 7-

12. There is no dispute that federal law required them to ensure that black voters could elect their candidates of choice in those districts. The only dispute is whether the drafters went about the process in the right way.

As a strategy to secure preclearance under Section 5, the drafters avoided lowering the black population in the preexisting majority-black districts. The Court has recognized that states have leeway to use race in redistricting to comply with federal law. *See* U.S. Br. 28-34. And a redistricting plan meets strict scrutiny if a state's use of race was "reasonably necessary to avoid retrogression." *Shaw v. Reno*, 509 U.S. 630, 655 (1993). Although the state needs a "strong basis in evidence" to support its consideration of race, *id.* at 656, it does not have to "get things just right," *Vera*, 517 U.S. at 978 (plurality opinion).

The plaintiffs introduced almost no evidence below to show that lower percentages would preserve black voters' ability to elect in Alabama's majority-black districts. The only witness who testified that the percentages could be lower was plaintiffs' expert, Theodore Arrington. J.S. App. 90-93. But the district court made an express determination that his testimony on this point was not credible. J.S. App. 91-93. For example, his testimony here is contrary to his testimony in previous redistricting cases in Alabama, in which he testified that black-voting-age-population percentages of 61% would create toss-up districts that gave black voters only a "chance" to elect a candidate of choice. J.S. App. 91-92 (discussing *Wilson v. Jones*, 130 F. Supp. 2d 1315 (S.D. Ala. 2000)). The plaintiffs now rely on Allan Lichtman, but his testimony was specific to the three districts

he examined as part of the plaintiffs' Section 2 claim: "I'm not making any points about any other aspects of the elections. That's not what I studied. I simply studied the *Gingles* factors." Tr. 3.101-03, 107.

Alabama's drafters relied on the best evidence available to them to ensure that they did not diminish black voters' ability to elect: established caselaw, the existing districts, the Democrats' prior redistricting practices, and the suggestions of black political leaders. J.S. App. 184. Black political leaders and the caselaw suggested to the drafters that safe districts are 65% black. In this respect, it is telling that only 4 of the 13 House districts that the ALBC criticizes as being too close to the "quota" are above 65% black. ALBC Br. 30. None of the Senate districts that are criticized as being too close to the "quota" are above 65% black. *See* ALBC Br. App. 7a. The plaintiffs are wrong to attack the drafters' good-faith preclearance strategy.

A. The drafters believed that Section 5 prohibited "significant reductions" in black population.

The plans were drafted on the premise that "significant" or "sizable" reductions in black population percentages in the preexisting majority-black districts would almost certainly be retrogressive. The district court expressly found that the drafters "understood 'retrogression' under section 5 of the Voting Rights Act to mean the reduction in the number of majority-black districts or a significant reduction in the percentage of blacks in the new districts as com-

pared to the 2001 districts with the 2010 data." J.S. App. 33.

In an attempt to show that the drafters believed Section 5 to prohibit any *minimal* reduction in black percentage, the plaintiffs rely almost exclusively on the testimony of Senator Dial. But he is not an expert or a lawyer, he did not draw the lines of any particular district, and he had "very little input" into the House plan. APX 66 at 27:1-8, 28:4-14, 40:2-16; Tr. 1.55. Moreover, the plaintiffs take some of Senator Dial's testimony out of context. The plaintiffs say that Senator Dial rejected Senator Sanders' statewide plan merely because it decreased the black population percentage in some of the majority-black Senate districts. But Senator Dial said that he "can't remember" all the reasons for rejecting Senator Sanders' plan. APX 66 at 42:5. Senator Sanders' plan did not comply with the 2% deviation, and he did not propose the plan until deep into the legislative process. J.S. App. 58-59, 98-99. The plan also violated what Senator Sanders himself had told Senator Dial was necessary for the majority-black districts (i.e. at least 62% black). J.A. 177.

Randy Hinaman, the consultant who actually drew the lines, testified that he was concerned that preclearance would be denied if the black population percentage in a majority-black district was "significantly below" the old percentage. J.A. 88. This was the political consultant's testimony about his understanding of Section 5 when responding to a direct question at trial: "[I]f I was significantly below [the 2010 census percentages as applied to 2001 lines] I was concerned about that being retrogression that would be looked upon unfavorably by the Justice De-

partment under Section 5." J.A. 88. He similarly testified in his deposition that: "I thought if we had large deviations from previous percentages that that would potentially create preclearance problems with the Department of Justice." APX 75 at 24-25. He did not want a district to "go[] from 60 percent to 51 [percent] or something like that." APX 75 at 61:7-11.

B. The drafters had a strong basis in evidence to avoid reducing black population in the preexisting majority-black districts to prove that the plans had no retrogressive effect.

The drafters' strategy was a reasonable way to prove that the new plans did not have retrogressive effects. The burden under Section 5 is on *the state* to establish that a plan does not have the effect of retrogressing the position of a racial minority. *See South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). It is not a matter of defending against litigation; it is a matter of proving the *absence* of retrogression.

It is "never easy to prove a negative." *Elkins v. United States*, 364 U.S. 206, 218 (1960). But in 2006, Section 5 became even more burdensome because Congress amended the Voting Rights Act to prohibit any plan with the "effect of diminishing the ability" of racial minorities in a majority-minority district to "elect their preferred candidates of choice." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, P.L. 109-246, 120 Stat. 577 (2006). To prove that the plans did not "diminish the ability of" black

voters to elect their "candidates of choice," the drafters reasonably sought, where possible, not to decrease the black population in the preexisting black districts.

1. The drafters' preclearance strategy was reasonable.

The drafters focused on the black population percentages in the districts because DOJ's guidelines told them to. Those guidelines state that a "comparison of the census population of districts in the benchmark and proposed plans" is "the important starting point of any Section 5 analysis." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011). Indeed, when a state submits a plan for preclearance, the DOJ's regulations require it to provide *only* population data and maps. *See* 28 C.F.R. §§51.27(q); 51.28(a)(1) & (b)(1). DOJ's guidelines say that it will use that data as "the important starting point" to determine "whether the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race...." 28 C.F.R. § 51.52(a).

This is consistent with Section 5 caselaw, which holds that a deeper inquiry into a minority's ability to elect is unnecessary if population statistics alone reflect that ability. "Placing black voters in a district in which they constitute a sizable and therefore 'safe' majority ensures that they are able to elect their candidates of choice." *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). Therefore, under Section 5, if a racial minority "constitutes a supermajority in a dis-

trict," there is "no need to make further inquiries into minority voters' ability to elect." *Texas*, 831 F. Supp. 2d at 263. The Court's retrogression analysis in *Beer* consisted, entirely, of a "straightforward" comparison of the racial characteristics of the old and new districts. *Beer v. United States*, 425 U.S. 130, 142 (1976). *See also Vera*, 517 U.S. at 983 (Section 5 could "justify maintenance . . . of the African-American population in District 18"); *United Jewish Org. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977) ("[T]he percentage of eligible voters by districts is of great importance to [Section 5] inquiry.").

We agree with the plaintiffs that it is *theoretically possible* for a plan to reduce a majority-black district's population and still be precleared. *See also* NAACP Br. 12. The plans here, for example, reduced the black population in a number of districts. But the counterpoint is also true: avoiding a reduction in a majority-black district is *one way* that a state can meet *its* burden to establish non-retrogression.[18] The state had to generate evidence to prove the negative proposition that its plans were not retrogressive. By avoiding a reduction of black population in preexisting majority-black districts, the state generated that evidence, foreclosing a battle of experts about black voting patterns, registration rates, and other factors.

In fact, as the district court points out, this process is how the plaintiffs themselves redistricted when they were in power. J.S. App. 161-62. Dr. Reed,

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[18] The only time DOJ has apparently denied preclearance to a plan that kept the minority population stable was in a plan that replaced one group of Hispanics with another group of Hispanics that was less likely to vote.

the ADC's chairman, testified that his foremost goal in the previous round of redistricting was: "We're not going to lower the black districts." Tr. 2.165. The ALBC's brief notes that the Democrats in 2001 did not repopulate the majority-black districts to the level of the most recent election. *See* ALBC Br. App. 8a. Instead, they repopulated the majority-black districts to the same level *as they had been in 1993*. J.S. App. 21, 46. The ALBC does not explain how the difference in determining the purported "quota" justifies the Democrats' use of a "quota" but not the Republicans'.

Alabama's legislators were also not alone in preserving the population of existing majority-minority districts as a strategy to comply with Section 5 after the 2006 reauthorization. Although critical of the practice, one law professor reports that redistricters in California, Florida, North Carolina, South Carolina, Texas, and Virginia intentionally sought to preserve minority population percentages in majority-minority districts during the most recent redistricting cycle. *See* Justin Levitt, *Color by Numbers: The New Misreading of the Voting Rights Act*, 21-29 (Aug. 23, 2014) (unpublished manuscript).[19]

The plaintiffs argue that, instead of the simple task of avoiding drops in black population, the drafters should have performed a district-by-district "functional analysis." But the drafters had no reason to turn the question of compliance into a "Monday-morning 'battle of the experts.'" *Edwards v. Aguillard*, 482 U.S. 578, 596 (1987). "[D]eference is

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[19] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487426 (last visited Oct. 6, 2014).

due to [states'] reasonable fears of, and to their reasonable efforts to avoid . . . liability." *Vera*, 517 U.S. at 978. The "strong basis in evidence" standard gives the states leeway in considering race to avoid liability under the Voting Rights Act. *See Ricci v. DeStefano*, 557 U.S. 557, 582-583 (2009); *LULAC*, 548 U.S. at 520 (Scalia, J., dissenting and concurring) ("[A] State is permitted great flexibility in deciding how to comply" with the Voting Rights Act.). The drafters' strategy was within that leeway.

2. The drafters' strategy is consistent with Section 5's 2006 text.

The drafters' strategy is also consistent with the text of the 2006 reauthorization. In *Georgia v. Ashcroft*, the Court held that a court under Section 5 "should not focus solely on the comparative ability of a minority group to elect a candidate of choice . . . [because this factor] cannot be dispositive or exclusive." 539 U.S. at 480. Congress disagreed with *Georgia v. Ashcroft* and expressly reversed it. It made the "comparative ability of a minority group to elect a candidate of choice" the "dispositive or exclusive" factor.

To overturn *Georgia v. Ashcroft*, Congress added subsections (b) and (d) to Section 5 to prohibit "[a]ny" voting change that "has the purpose of or will have the effect of diminishing the ability of any" voter "on account of race or color . . . to elect their preferred candidates of choice." Voting Rights Act § 5, 42

U.S.C. § 1973c.[20] The relevant question for judging retrogressive effect is now whether minorities' preferred candidate "under the benchmark plan is *equally likely* to win under the new plan." Nathaniel Persily, *The Promise & Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 223 (2007) (emphasis added). "If not, then minorities' ability to elect their preferred candidate is diminished." *Id.*

This "ability to elect" standard is a comparative inquiry that recognizes that districts move along a continuum in their "ability to elect." "[T]he ability to elect preferred candidates, like the ability to play the violin, is a matter of degree, not a difference in kind." Persily, *supra*, at 243. Therefore, "[d]iminishing a district's ability to elect does not necessarily mean reducing it from a safe district to a hopeless district;" it could also "mean reducing a safe district to a competitive district." *Id.* As the district court explained, a plan that "substantially reduce[s] the percentages of black voters within the majority-black districts" will necessarily "diminish black voters' ability to elect their preferred candidates," even if it does not result in black voters having *no* chance to elect a candidate of choice. J.S. App. 181.

This is especially true with respect to the preexisting districts in Alabama. None of these districts was 99% black. They were all in the 50s, 60s, and 70s. And black voting-age population is two or three points less than total black population, such that a 60% black district actually has a 57% black voting-

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[20] Section 5 has recently been reclassified at 52 U.S.C. § 10304. We use the old citations so that our citations match the district court's and appellants'.

age-population. Reducing a district from 65% black voting-age population to 55% black voting-age-population will obviously "diminish" black voters' "ability to elect a candidate of choice" by making the district more competitive. In fact, the plaintiffs' expert testified that black voters in these kinds of districts would have only a "fighting chance" or "reasonable opportunity" to elect a candidate of choice. Tr. 3.51-52, 58.

3. The drafters' strategy is consistent with the 2006 legislative history.

The drafters' strategy to comply with Section 5 also finds support in the legislative history of the 2006 reauthorization. Congress was well aware that its 2006 changes would lead redistricters to preserve existing black populations in existing majority-minority districts.

First, by overturning *Georgia v. Ashcroft*, Congress effectively approved of the district court opinion that this Court had reversed. That district court had held, "[i]n large part, the retrogression inquiry looks to the plan's effect on minority voting strength by considering the number of potential African American voters in the existing and proposed districts." *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 78 (D.D.C. 2002). The court noted that "there is a correlation between a district's [black voting age population] and the likelihood that a candidate of choice will be elected in that district" and highlighted the fact that "reductions of over 10% are present" in Georgia's plan. *Id.* at 80, 82. Even though Georgia produced an expert to opine that black voters would

still have an excellent chance to elect their candidate of choice in the new districts, the district court held that Georgia had not met its burden and denied preclearance. The district court expressly reasoned that Section 5 was a "one-way ratchet." *Id.* at 98 (Edwards, J., concurring). *Compare* J.S. App. 263 (dissenting opinion) (arguing that Section 5 is *not* a "one-way ratchet").

Only one witness testified against overruling *Georgia v. Ashcroft* in the Senate, warning the Judiciary Committee that "overrul[ing]" it would be "a mistake." That witness was the ADC's counsel, Professor Richard Pildes. *See The Continuing Need for Preclearance: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 2d Sess. at 11 (2006) (statement of Richard H. Pildes).[21] When asked why he did not want Congress to impose a "diminished ability to elect" standard, Prof. Pildes responded with the same policy arguments that the ADC makes in its brief. He told Congress that a "no 'diminished ability to elect'" standard "has a rigidity and a mechanical quality that can lock into place minority districts in the south at [high black] populations that do not serve minority interests." *Id.* at 12. *See, e.g.*, ADC Br. 37 (criticizing Alabama's compliance efforts as "too rigid and mechanical"). He suggested, as an example, that "dropping the minority population" of a district "from 60 percent to 55 percent" could violate the standard. *Id.* Congress adopted the "diminished ability to elect" standard anyway.

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[21] Available at http://www.gpo.gov/fdsys/pkg/CHRG-109shrg28753/pdf/CHRG-109shrg28753.pdf (last visited Oct. 8, 2014).

Second, when overruling *Ashcroft*, Congress expressly approved of state districting plans that intentionally preserved black population in majority-black districts. The House report noted approvingly that, when Georgia redrew its congressional districts after a court overturned them in 2005, "[t]he plan it drew maintained the black voting age population in the two majority black districts . . . at almost exactly their preexisting levels, and it did the same for the other two districts . . . that had elected black Members of Congress." H.R. Rep. No. 109-478, at 24 (2006), *reprinted in* 2006 U.S.C.C.A.N 618. The ACLU's report to Congress also lauded Georgia's 2005 plan, explaining that the plan complied with Section 5 because "[t]he black percentages in the majority black districts . . . were kept at almost exactly the same levels as under the plan that had been passed by the Democratic controlled legislature in 2002." *See* Laughlin McDonald, *The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union*, ACLU Voting Rights Project at 136 (Mar. 2006).[22]

On the other hand, when the House Committee surveyed recent practices that it said supported the reauthorization of Section 5, it highlighted redistricting plans that had reduced black population in majority-black districts. Among those practices was a Virginia county's decision to "reduce[] the African American population" in a particular district. H.R. Rep. No. 109-478, at 38. The Committee noted that

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[22] Available at https://www.aclu.org/files/pdfs/votingrights report20060307.pdf (last visited Sept. 12, 2014).

DOJ objected because "even a minute reduction would have greatly impaired African American voters' ability to elect candidates of choice." *Id.*

C. The drafters had a strong basis in evidence to avoid reducing black populations to prove that the plans did not have a "discriminatory purpose."

Under the new Section 5, the state also had the burden to prove that the plans were *not* motivated by a discriminatory purpose, as broadly defined. In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), the Court held that Section 5 does not prohibit changes that, although motivated by a discriminatory purpose, are non-retrogressive. Congress explicitly reversed *Bossier Parish* in 2006, amending Section 5 to provide that a forbidden purpose is "any discriminatory purpose," not merely a retrogressive purpose. 42 U.S.C. § 1973c(c). Because it is the state's burden to overcome Section 5, this provision effectively created a presumption that the plans were discriminatory.

To disprove the presumption that their plans were motivated by a discriminatory purpose, the drafters based their majority-black districts on the preexisting districts that black legislators had drawn when their party was in power. They also incorporated the views and suggestions of black legislators for their own districts. J.S. App. 184. Most of those legislators told the drafters to maintain the black population in the majority-black districts at between 60% and 65%, and they proposed changes to their own districts that accomplished that goal. J.A. 51,

177, 178. This focus is consistent with voting-rights caselaw from Alabama. As we have already noted, one of the plaintiffs' experts testified in a previous Section 2 case that a 61% black district would be a district in which black voters only *might* be able to elect their candidate of choice. J.S. App. 91-92. The drafters had no reason to ignore this advice and caselaw. As Senator Dial testified, "if [he] had told" black political leaders that he knew what was best for black people in Alabama, they would have "asked [him] when [he] was going to the mental institute." Tr. 1.44-45.[23]

Imagine the strength of the purposeful discrimination argument if the Republican drafters had: (1) ignored the suggestions of black legislators for their own districts, but incorporated the suggestions of white legislators for their districts, (2) reduced the black populations in majority-black districts by flooding them with white voters who tend to vote Republican, (3) created scores of districts that were less than the 60% to 65% threshold that black political leaders referenced and caselaw supported, and (4) acted in a substantially different manner than the Democrats had when they redistricted in 2001. It would have been very difficult for the state to bear *its* burden to establish that those plans did *not* have a discrimina-

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[23] This kind of thing has not gone over well in other states. In North Carolina, for example, a "white ACLU attorney" criticized a black legislator's approach to redistricting, and he responded, "I've been black all my life, I've fought for black causes, and I don't need some white woman from Atlanta telling me what to do." Maurice T. Cunningham, *Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice*, 123-24 (Praeger Publishers 2001).

tory purpose. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977).

D. The state should have the discretion not to perform a subjective and expensive "functional analysis" for every majority-minority district.

Finally, the ADC's view—that legislators *must* perform a functional analysis for each majority-black district as part of the redistricting process—raises serious practical and constitutional problems. It is also inconsistent with the principle of allowing legislators discretion to comply with Section 5.

First, requiring state legislators to perform a race-focused functional analysis for each and every majority-black district greatly exacerbates the federalism costs of Section 5. Allowing states to compare, based on current census data, the number and population of majority-minority districts in the benchmark plan and proposed plan simplifies the process. It is an objective standard to judge retrogression that legislators can easily apply.

Second, requiring a "functional analysis" for all districts would inject racial stereotyping into redistricting in unwarranted ways. A functional analysis requires, at its first step, the identification of minority voters' purported "candidate of choice." Then the question is how many minority voters must be in a district to elect that "candidate of choice." This process, as described by the plaintiffs, "encourages a racially based understanding of the representative function," under which "geographic districts are

merely a device to be manipulated to establish 'black representatives' whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms of race." *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring).

This is also a highly subjective way of complying with Section 5. For example, the plaintiffs' expert, Allan Lichtman, opined that the white incumbent in HD 73 was black voters' candidate of choice, and the ADC's brief repeats this assertion. *See* ADC Br. 33. But the ADC's chairman apparently disagreed. He testified that this incumbent legislator would not win an election if his district were majority black, instead of plurality black. The chairman explained that, in the ADC's proposed plan, he intentionally reduced the black population in HD 73 so that the white Democrat could continue to be elected. *See* J.A. 53. The ADC's chairman believed that, if there were "too many" black voters in the district, "some black would run against [the incumbent white Democrat], and we can't stop it." *See id.*

The way to avoid this stereotyping and subjectivity is by allowing states the leeway to comply with Section 5 based primarily on population statistics. If enough black voters are in a district, then we can be confident that the candidate of choice supported by black voters will win. There is no need for the state to identify black voters' "candidate of choice" so that it can then determine how many black voters must be in a district to elect *that* candidate. The voters in a district will tell the state who they want to represent them, not the other way around.

* * *

Alabama's new legislative leaders sought to comply with federal voting laws that their forebears would have resisted. They did not gerrymander "white Democratic districts" to undermine their own political party. But they balanced competing interests and preserved the status quo. They did not maximize black political influence, but they ensured that black voters would be represented in the Legislature in proportion to their share of the population. The plans they adopted may not be perfect, but they are constitutional.

CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

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October 9, 2014

APPENDIX

Comparison of black population percentages between the competing plans in all House Districts 1a

Comparison of black population percentages between the competing plans in all Senate Districts 5a

Population by county in Alabama from APX 19 ..... 7a

Population of various cities/towns in Alabama's majority-black districts from Census.gov 10a

Map of 2001 House Districts reflecting over- or under-population 12a

Comparison of black population percentages between the competing plans in all House Districts

This table compares the black population percentages for all districts in the House plan as passed, DX 403 at 1-8, the McClammy plan, C45 at 6-13, the ADC plan drafted by Dr. Reed, C42 at 6-13, and the Knight plan drafted by Mr. Cooper, C46 at 6-13.

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
1	14.90%	17.63%	17.63%	17.60%
2	3.97%	1.98%	2.06%	2.48%
3	23.74%	18.53%	18.62%	23.62%
4	12.75%	8.77%	11.44%	15.14%
5	12.42%	10.23%	9.73%	9.44%
6	16.58%	30.60%	26.45%	27.59%
7	3.85%	16.70%	11.19%	2.34%
8	20.00%	25.62%	24.46%	24.74%
9	1.89%	2.55%	11.86%	6.24%
10	16.18%	13.41%	14.11%	5.56%
11	0.58%	0.39%	0.47%	0.61%
12	1.47%	1.51%	1.47%	1.68%
13	6.27%	6.35%	1.45%	5.65%
14	2.64%	2.98%	7.11%	12.20%
15	13.78%	10.31%	9.38%	10.13%
16	10.38%	10.08%	9.00%	7.52%
17	4.18%	3.38%	2.76%	6.24%
18	5.38%	4.39%	4.39%	4.27%
19	61.25%	67.07%	67.01%	75.39%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
20	3.84%	3.67%	3.12%	10.88%
21	8.51%	26.87%	29.64%	20.06%
22	5.74%	6.89%	6.30%	16.96%
23	3.80%	3.73%	3.72%	3.51%
24	1.50%	1.50%	1.46%	1.00%
25	15.99%	19.05%	15.60%	22.71%
26	1.55%	1.44%	1.52%	1.57%
27	1.51%	1.70%	1.65%	0.91%
28	29.35%	16.49%	17.52%	29.04%
29	3.50%	16.92%	16.31%	2.12%
30	4.37%	3.88%	5.93%	3.97%
31	15.85%	20.96%	21.06%	8.75%
32	60.05%	58.40%	56.68%	21.65%
33	21.22%	22.34%	21.30%	19.27%
34	1.73%	1.57%	1.86%	0.73%
35	16.08%	13.48%	14.98%	36.43%
36	12.19%	12.44%	10.46%	10.42%
37	29.31%	23.74%	20.85%	19.67%
38	17.93%	18.31%	29.41%	16.31%
39	5.23%	4.26%	4.24%	12.33%
40	13.25%	11.79%	13.46%	38.94%
41	11.97%	14.08%	16.04%	10.09%
42	10.97%	10.08%	11.93%	9.69%
43	6.64%	6.55%	8.09%	8.52%
44	11.48%	19.96%	27.02%	9.69%
45	15.18%	9.49%	7.86%	13.37%
46	7.53%	6.09%	6.94%	21.97%
47	20.13%	16.96%	16.48%	6.78%
48	5.65%	10.05%	9.93%	10.46%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
49	12.92%	13.30%	11.33%	62.65%
50	8.41%	8.57%	9.09%	5.77%
51	5.88%	14.09%	7.83%	7.32%
52	60.13%	62.27%	61.34%	54.07%
53	55.83%	62.00%	56.61%	55.86%
54	56.83%	31.46%	31.40%	58.72%
55	73.55%	62.92%	66.66%	64.03%
56	62.14%	61.06%	58.16%	54.02%
57	68.47%	62.27%	61.89%	60.27%
58	72.76%	66.20%	76.98%	61.09%
59	76.72%	66.62%	64.85%	61.27%
60	67.68%	62.26%	65.38%	59.55%
61	18.89%	25.02%	18.43%	14.41%
62	15.50%	15.12%	16.53%	17.99%
63	13.41%	24.15%	20.47%	22.08%
64	14.22%	12.76%	34.38%	31.91%
65	23.98%	29.45%	26.59%	14.81%
66	25.16%	28.20%	6.00%	2.54%
67	69.15%	69.21%	68.63%	69.43%
68	64.56%	53.87%	55.19%	25.43%
69	64.21%	57.56%	56.92%	57.62%
70	62.03%	61.18%	61.66%	57.21%
71	66.90%	60.42%	59.43%	54.45%
72	64.60%	60.37%	55.37%	56.25%
73	10.23%	22.54%	38.20%	83.58%
74	24.52%	27.36%	39.83%	26.18%
75	26.43%	30.03%	21.78%	20.14%
76	73.79%	75.62%	64.36%	24.45%
77	67.04%	67.34%	62.31%	59.38%

House District	Plan as Passed	Rep. McClammy Plan	ADC Plan	Rep. Knight Plan
78	69.99%	73.03%	74.21%	58.70%
79	11.62%	14.12%	13.55%	32.55%
80	17.19%	17.32%	17.51%	15.08%
81	19.86%	28.96%	25.39%	5.60%
82	62.14%	61.14%	57.22%	53.63%
83	57.52%	61.87%	55.99%	13.30%
84	52.35%	51.40%	52.00%	26.29%
85	50.08%	47.96%	53.94%	54.21%
86	13.46%	16.11%	14.59%	40.50%
87	8.86%	8.45%	8.82%	25.83%
88	18.23%	14.11%	16.70%	71.97%
89	32.00%	30.47%	30.25%	17.38%
90	34.65%	29.39%	39.63%	56.29%
91	15.73%	15.59%	18.03%	18.05%
92	12.64%	14.54%	13.15%	10.79%
93	17.11%	19.07%	13.81%	8.17%
94	8.21%	8.35%	8.87%	10.76%
95	4.94%	4.87%	4.86%	6.84%
96	10.23%	11.37%	11.22%	5.26%
97	60.66%	63.00%	63.59%	57.19%
98	60.02%	60.22%	61.57%	63.75%
99	65.61%	62.92%	63.55%	57.98%
100	14.98%	14.12%	10.31%	18.89%
101	17.02%	20.83%	22.65%	62.45%
102	7.90%	8.80%	8.12%	10.67%
103	65.06%	62.08%	63.03%	17.92%
104	15.79%	13.42%	13.30%	12.33%
105	9.06%	10.18%	10.30%	13.49%

Comparison of black population percentages between the competing plans in all Senate Districts

This table compares the black population percentages for all districts in the Senate plan as passed, DX 400 at 1-3, the Sanders plan drafted by Mr. Cooper, C47 at 4-6, and the ADC plan drafted by Dr. Reed, C48 at 4-6.

Senate District	Plan as Passed	Senator Sanders Plan	ADC Plan
1	10.98%	10.55%	12.75%
2	24.40%	19.69%	13.86%
3	13.68%	11.11%	10.90%
4	1.74%	1.17%	1.43%
5	6.41%	9.51%	3.41%
6	15.04%	11.09%	7.05%
7	27.34%	41.26%	47.17%
8	3.28%	2.56%	2.90%
9	1.52%	5.91%	4.61%
10	12.27%	6.07%	13.04%
11	14.96%	26.67%	33.76%
12	20.10%	11.29%	11.99%
13	20.64%	27.79%	26.65%
14	14.08%	14.81%	11.71%
15	14.49%	11.53%	8.24%
16	11.83%	12.48%	11.81%
17	5.36%	6.66%	7.31%
18	59.10%	58.49%	61.32%
19	65.31%	65.30%	62.89%
20	63.15%	62.82%	65.10%

Senate District	Plan as Passed	Senator Sanders Plan	ADC Plan
21	15.50%	17.29%	16.96%
22	21.52%	20.43%	29.66%
23	64.84%	57.75%	61.23%
24	63.22%	56.90%	60.43%
25	22.82%	34.06%	28.89%
26	75.13%	71.28%	68.44%
27	21.15%	22.75%	20.16%
28	59.83%	51.55%	60.38%
29	15.01%	18.77%	13.24%
30	21.95%	18.63%	14.90%
31	19.40%	23.63%	19.83%
32	7.84%	7.74%	7.81%
33	71.64%	71.83%	65.83%
34	12.69%	14.17%	11.34%
35	19.11%	18.87%	25.12%

Population by county in Alabama from APX 19.

County	Total Population	% Black Population
Macon	21,452	83.5%
Greene	9,045	81.8%
Sumter	13,763	75.2%
Lowndes	11,299	73.9%
Wilcox	11,670	72.8%
Bullock	10,914	70.6%
Dallas	43,820	70.0%
Perry	10,591	69.0%
Hale	15,760	59.2%
Montgomery	229,363	55.4%
Marengo	21,027	52.2%
Barbour	27,457	47.4%
Conecuh	13,228	47.0%
Clarke	25,833	44.3%
Butler	20,947	43.8%
Choctaw	13,859	43.7%
Russell	52,947	42.8%
Jefferson	658,466	42.5%
Monroe	23,068	42.4%
Pickens	19,746	42.2%
Chambers	34,215	39.4%
Pike	32,899	37.4%
Mobile	412,992	35.3%
Escambia	38,319	32.5%
Talladega	82,291	32.3%

County	Total Population	% Black Population
Coosa	11,539	31.4%
Tuscaloosa	194,656	30.1%
Henry	17,302	29.1%
Tallapoosa	41,616	27.1%
Houston	101,547	26.6%
Washington	17,581	25.3%
Madison	334,811	25.1%
Crenshaw	13,906	24.1%
Lee	140,247	23.4%
Bibb	22,915	22.4%
Calhoun	118,572	21.4%
Elmore	79,303	20.6%
Randolph	22,913	20.6%
Dale	50,251	20.6%
Autauga	54,571	18.3%
Coffee	49,948	17.6%
Colbert	54,428	16.8%
Etowah	104,430	15.8%
Clay	13,932	15.6%
Limestone	82,782	13.3%
Covington	37,765	13.1%
Morgan	119,490	12.6%
Lawrence	34,339	12.0%
Fayette	17,241	11.9%
Lamar	14,564	11.9%
Shelby	195,085	11.1%
Lauderdale	92,709	10.7%
Chilton	43,643	10.2%

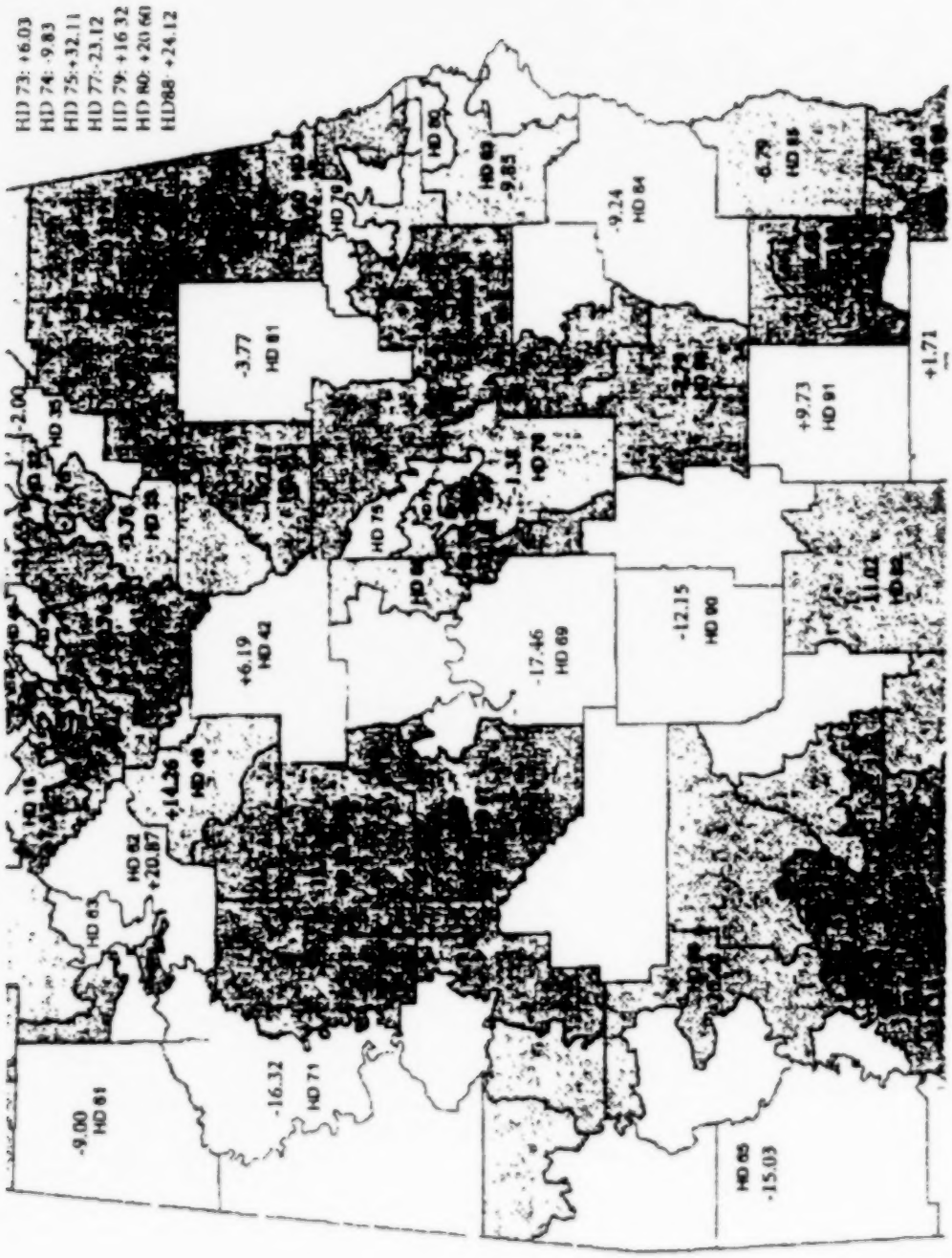
County	Total Population	% Black Population
Geneva	26,790	10.1%
Baldwin	182,265	9.9%
St. Clair	83,593	9.0%
Walker	67,023	6.4%
Cherokee	25,989	5.1%
Franklin	31,704	4.4%
Marion	30,776	4.2%
Jackson	53,227	3.9%
Cleburne	14,972	3.7%
Marshall	93,019	2.1%
DeKalb	71,109	1.8%
Blount	57,322	1.6%
Cullman	80,406	1.3%
Winston	24,484	0.7%

Population of various cities/towns in Alabama's majority-black districts from Census.gov:

To view this information online, select "Advanced Search" at the top of the American FactFinder page of the Census.gov website (http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml). Enter table name "DP-1:Profile of General Population and Housing Characteristics:2010" and click "Go." Then select the "Geographies" filter on the left side of the page and select "Place—160" in the dropdown box. In the next dropdown box, select "Alabama" and then "All Places within Alabama." Next click "Add to your Selections." When these words appear in the "Your Selections" box, close the dialog box. Select the "2010 Demographic Profile SF" dataset. From the resulting page, either download the entire data set for all Alabama cities or select the desired city from the dropdown box labeled "Geography."

City/Town	Total Population	% Black Population
Bessemer	27,456	71.2%
Birmingham	212,237	73.4%
Center Point	16,921	62.9%
Clayton	3,008	63.8%
Eutaw	2,934	80.2%
Evergreen	3,944	62.4%
Fairfield	11,117	94.6%
Forestdale (CDP)	10,162	71.4%
La Fayette	3,003	68.8%
Lanett	6,468	57.5%

City/Town	Total Population	% Black Population
Livingston	3,485	63.9%
Marion	3,686	64.1%
Midfield	5,365	81.6%
Mobile	195,111	50.6%
Monroeville	6,519	55.7%
Montgomery	205,764	56.6%
Prichard	22,659	85.8%
Selma	20,756	80.3%
Selmont-West Selmont (CDP)	2,671	93.9%
Tuskegee	9,865	95.8%
Union Springs	3,980	71.8%
York	2,538	85.6%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HD 74: -9.83
HD 75: +32.11
HD 77: -23.12
HD 79: +16.32
HD 80: +20.60
HD88: +24.12
-9.00
HD 61
-16.32
HD 71
HD 63
HD 62
+20.87
+14.26
HD 48
+6.19
HD 42
-17.46
HD 69
-12.15
HD 60
-3.77
HD 81
-9.85
HD 83
-9.24
HD 84
-6.79
HD 88
+9.73
HD 91
+1.71
HD 85
-15.03

REPLY BRIEF

SUPREME COURT, U.S.
FILED
OCT 28 2014
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No. 13-1138

In The
Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,

Appellants,

v.

ALABAMA, ET AL.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

Twenty-eight times, Alabama's brief tells this Court that the state had a preclearance "strategy" of re-populating each and every black-majority district as closely as possible to its prior black-population percentage (the fixed BPP policy). As those repeated statements demonstrate, Alabama's policy was applied in every black-majority district; each had to be re-populated to end up "as close as possible" to its racial-target figure.

That fact is the critical one here. This policy is unconstitutional in itself. But if the unconstitutionality of those ends is not enough alone, Alabama's use of systematic race-based means to achieve these unconstitutional ends, such as race-based splitting of precincts, further demonstrates the unconstitutionality of this policy.[1] Section 5 does not justify Alabama's policy; the Equal Protection Clause does not permit it.

I. Liability: Alabama Applied a "Fixed BPP" Policy That is Unconstitutional In Itself

Alabama adopted and *applied* an unconstitutional policy in designing all its black-majority districts and – as is virtually inevitable given that policy

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[1] The ALBC reply brief documents these means, including race-based precinct splitting.

– also systematically used an unconstitutional means to achieve that policy. The welter of district-specific factual matter obscures whether Alabama disputes that it applied the fixed BPP *policy* or whether it disputes that it used race-based *means* to implement that policy. In fact, Alabama did both; this brief primarily addresses the former, and the ALBC brief, incorporated here by reference, addresses the latter.

The mapmakers acknowledge that they adopted this policy at the outset, but say they believed Section 5 required it. Compliance with that policy was, and had to be, their highest priority (along with population equality) because, as the state argues, the Supremacy Clause required it. Alabama Br. 2, 16 (AL Br.) Having defined re-creating the prior BPPs as their federal obligation, the mapmakers rightly understood themselves to be obligated to subordinate all other non-federal objectives to meeting these racial targets. Those targets were the one outcome that could not be negotiated or compromised. As Hinaman logically testified, a goal such as "to change each district as little as possible" was "a goal, but it's certainly down on the list from one person, one vote and not retrogressing the minority districts. . . ."[2]

Similarly, there is no dispute that the redistricters *first* designed the black-majority districts to get those districts "right." As one of the mapmakers

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[2] Tr. III at 162. Tr. III = Trial Transcript Vol.III.

testified: "After making sure that the black-majority districts met our obligations under the VRA, we tried to take care of the rest of the State." McClendon Affidavit, APX 64, at 3 (same).

At times, the state suggests ADC's claim is based on circumstantial evidence – as if the plaintiffs notice the high BPP levels in the black-majority districts and now try to infer that Alabama must have set rigid racial targets based on the prior map. But ADC's case is a direct-evidence one. There is no need to infer the policy Alabama employed; the state has confessed it, consistently and repeatedly. That the new districts largely match the BPPs of the prior districts merely confirms that the state did what it set out to do.

Alabama *applied* this policy in every black district because it claimed to believe it had no choice. To the extent there is any potential confusion about that, it stems from two issues. First, although the mapmakers managed to re-create the BPPs with remarkable precision in most districts, in some districts doing so was not possible as a practical matter. They could not, of course, achieve 100% "perfection" everywhere. But even where not possible, they still tried to come as close to meeting those targets as the black-population distributions permitted. The state necessarily applied its fixed BPP policy to every black district, even if it fell a small amount short in some places. The only reason the state ever offered for missing its racial targets in some districts is that "it was obviously . . . unavoidable because there was

just not the African-American population to enter those districts." ADC Br. 16 (quoting Hinaman). As Hinaman testified many times, he "tried to be as close as possible" to the prior numbers, ALBC Br. 23 n.35, but "[s]ometimes there's no way to avoid it."[3] The state has never argued that it abandoned its fixed BPP policy, in any district, in order to reach some other objective. Alabama necessarily *applied* that policy in those districts, even if the policy could only be *realized* all of the way in some districts.

Second, whether Alabama could have created districts at the same BPP levels had it adopted some *other* policy is irrelevant to the factual issue of what policy Alabama actually did apply. In fact, Alabama applied its fixed BPP policy in all black districts.

A. Alabama's Policy is Unconstitutional.

1. ADC's argument is not that a simple target figure for BPPs would, in itself, be inconsistent with Section 5 and the Constitution. The defect in Alabama's policy is that, in an area of significant constitutional sensitivity, Alabama used race-based target BPP *figures that reflect no policy judgment at all regarding the ability to elect and are not even a good-enough proxy for that ability* (had Alabama even employed that policy as a proxy). The state simply

[3] Tr. III at 163.

looked at racial percentages and decided to keep them constant. It adopted this policy as a preclearance strategy, nothing more.

That policy is unconstitutional; the legal reason why can be stated in several ways. In ADC's view, the most direct way is that this race-based policy lacks any legitimate justification. The state's only justification is that Section 5 required its policy; as we have demonstrated, that is clearly wrong. The result is a naked policy of race-based population targets that has no legitimate justification at all. Such a policy is, in itself, unconstitutional.

To clarify this point, suppose that voting were no longer racially polarized in Alabama. Yet the state adopted its fixed BPP policy for the same reason as here – because it thought Section 5 required it, or that the policy was a cunning preclearance strategy. Is there any doubt the policy would be unconstitutional? Section 5 could not justify that policy; it would certainly bear no relationship to the ability to elect. Similarly, black voter registration and turnout rates in Alabama in 1990 were 16.6 points below that of whites; at that time, to ensure the ability to elect in the teeth of racially-polarized voting, districts with 65-69% BPP districts were required. Amicus Brief Prof. Gaddie et al. But today, black participation rates in Alabama equal or exceed those of whites. Section 5 cannot justify using race-based population targets from the 1990s or ones that do not bear a proper relationship to the ability to elect in current conditions.

When a state adopts a race-based policy for a constitutionally illegitimate end, that policy is unconstitutional, even if race-neutral means of implementation are used. Race-based public-university admissions quotas are "facially invalid." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978). Race-neutral means to achieve that quota would still leave the quota unconstitutional. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court held Alabama's criminal-disfranchisement provisions, enacted for racially-discriminatory purposes, unconstitutional on their face, even though the means used (the crimes selected) were facially neutral. Similarly, *Grutter v. Bollinger,* 539 U.S. 306, 330 (2003), described "outright racial balancing" as "patently unconstitutional." When the ends a policy seeks to realize themselves lack a legitimate justification, such a policy is unconstitutional, regardless of the means of implementation.

The issue is not different in redistricting merely because race can be a factor or because redistricters will "almost always be aware of racial demographics. . . ." *Miller v. Johnson,* 515 U.S. 900, 916 (1995). That race was a factor in Alabama's redistricting is not, of course, what makes the fixed BPP policy unconstitutional. It is that the race-based, fixed BPP policy, which the state justifies only as necessary to comply with Section 5, is not tied in any meaningful way to current conditions regarding the ability to elect – and was not even based on a judgment about that. As a result, the policy becomes a form of "racial

balancing" (or, perhaps, "imbalancing") for its own or no sake – at the very best.

Thus, the means Alabama used in specific districts to achieve its unconstitutional ends are not legally essential. The state goes to great length to try to show that it employed race-neutral means. But even if true – it is not – the use of these racial-target figures well above the levels necessary to ensure an ability to elect (indeed, with no judgment on that issue at all) is not justified by Section 5.[4]

Given that the policy lacks a legitimate justification, ADC believes the Court need not enter into the complexities of predominant-motive analysis. But if the Court were to apply a predominant-motive and narrow-tailoring analysis, that analysis should be applied to the state's *policy,* not to the design of each particular district one-by-one. Because Alabama believes the Supremacy Clause obligated it to meet

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[4] Alabama seems to argue that the plaintiffs do not have a cause of action because Section 2 of the VRA makes "race-packing" of districts illegal. But Alabama misunderstands ADC's claim, Section 2 law, or both. To prove a Section 2 race-packing claim, plaintiffs must meet the requirements of *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Bartlett v. Strickland*, 556 U.S. 1 (2009); in particular, they must prove, at the least, that another reasonably compact, majority-black district could be created if other districts were "unpacked." *See, e.g., Hall v. Virginia*, 385 F.3d 421, 429 n.12 (4th Cir. 2004); *NAACP v. Snyder*, 879 F. Supp. 2d 662, 677 (E.D. Mich. 2012). Not all constitutionally excessive uses of race in districting are covered by packing or dilution claims under the VRA.

these fixed BPP targets as closely as possible, the conclusion that this race-based policy satisfies the predominant motive test is unavoidable. It was the end that could not be compromised, along with the population-equality requirement that any plan must meet. Indeed, because this fixed BPP was the predominant motive for the design of all black-majority districts, the predominance of that race-based requirement is even more clear here than in *Shaw* itself. *See Shaw v. Reno*, 509 U.S. 630 (1993).

2. If proof is needed that Alabama also employed race-based means to achieve its (unconstitutional) ends, the record establishes that Alabama did that, too. The district court itself actually found that as a matter of fact, but failed to appreciate the legal significance of its own findings.

In both Montgomery and Jefferson Counties, the court found that districts (HD 73 and 53) had been eliminated and moved elsewhere "to avoid retrogression" – as the state understood it – in the nearby black-majority districts. JS App. 36-37; JS App. 49; JS App. 38 ("to avoid retrogression" the mapmakers "used the population that had previously been located with District 53 to repopulate the other majority-black districts in Jefferson County"). These statements and findings mean that Hinaman moved large numbers of black residents, as such, out of HD 73 and 53 for the purpose of meeting his racial targets. The court concluded Section 5 *justified* the state's approach, but the fact that Hinaman used racial means to meet his racial targets is contained in the court's

own findings. The ALBC briefs document these race-based means in extensive detail.

But it is not the means that make Alabama's approach unconstitutional; it is the illegitimate race-based ends that they serve. Indeed, it is virtually inevitable that such a policy would require race-based means of deciding which voters to retain or move in and out of districts, particularly when the state's new 2% population standard required hundreds of thousands of voters to be redistributed. That is part of why it is essential for the Court to recognize that such policies fail constitutional scrutiny when Section 5 is wrongly invoked to justify them.

B. Alabama's Defenses are Unavailing.

1. The Section 5 Defense. Alabama asserts the post-2006 version of Section 5 required the state to avoid any small BPP reduction. That was not the law before 2006; Alabama thus argues that Congress made an avulsive change in 2006.

Alabama asserts that the terms "diminishing the ability to elect" now in Section 5 mean any non-trivial reduction in BPPs. 42 U.S.C. 1973c(b). But those terms have a long history in voting-rights law and had not meant, before 2006, any non-trivial reductions in BPP that did not actually affect an equal opportunity for "the" ability to elect. Congress specifically relied on that history when it incorporated these terms of art into Section 5.

The "diminishing the ability to elect" language appeared at least as early as the House Report that accompanied the 1975 re-authorization of Section 5. U.S. Br. 23. As the United States points out, this Court used that language in *Beer v. United States*, 425 U.S. 130 (1976) and *Bush v. Vera*, 517 U.S. 952, 983 (1996) (plurality opinion).

Similarly, lower federal courts, where most VRA litigation occurs, had also used this or closely similar language in dozens of cases over many years.[5] Similar language had long been used in Section 2 cases as well.[6] The term "diminish the ability to elect" must be read, not in a vacuum, but against this long history of judicial decision and DOJ administration, documented in our opening brief, to which Congress repeatedly referred. *See* S. Rep. No. 109-295, at 18-19 (2006); H.R. Rep. No. 109-478, at 70-71 (2006). *See generally Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005) (legal terms of art should be read in accord with their established meaning). Those words must

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[5] *See, e.g., Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 645-46 (D.S.C. 2002); *Bodker v. Taylor*, No. CIV.A.1:02-CV-999ODE, 2002 WL 32587312 at *10 (N.D. Ga. June 5, 2002); *Georgia v. Reno*, 881 F. Supp. 7, 13 (D.D.C. 1995); *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1277-78 (11th Cir. 2002); *Prejean v. Foster*, 227 F.3d 504, 517 n.24 (5th Cir. 2000); *Theriot v. Parish of Jefferson*, 185 F.3d 477, 489 (5th Cir. 1999).

[6] *See, e.g., Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1115-16 (3d Cir. 1993); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 652 (N.D. Ill. 1991) (three-judge court).

also be read in the context of the problem Congress aimed to solve, which was, as Congress stated repeatedly, to "restore" the *Beer* standard. *See, e.g.*, S. Rep. No. 109-295, at 21; H.R. Rep. No. 109-478, at 71.[7]

A version of Section 5 that required preserving black population numbers for their own sake, without any regard for the ability to elect, might well be unconstitutional – as would be districts drawn under that command. Reading Section 5 as Alabama does still leaves the state's policy unconstitutional.

2. The "Mt. Healthy" Defense. Alabama appears to suggest, in essence, a partial *Mt. Healthy* defense, without citing the case by name. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The state argues that "at least some of the majority-black districts have the right black population, regardless of how that population arrived there." AL Br. 26. Once again, the state focuses on

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[7] Alabama cites testimony before the Senate Judiciary Committee of the ADC's counsel, who urged Congress to leave *Georgia v. Ashcroft*, 539 U.S. 461 (2003) intact and not restore the *Beer* standard's exclusive focus on the ability to elect. AL Br. 80. That testimony argued that an exclusive focus on "the ability to elect" was too "mechanical" in contemporary circumstances. That was not, as Alabama would like to suggest, an argument against creating a new standard far *more* restrictive than *Beer* itself; no one was suggesting or proposing such a thing. We agree that the amendment restored the *Beer* standard.

racial percentages alone, rather than on the actual components of any given district. Of course, that counterfactual might be true for some districts regarding the one dimension of BPP taken in isolation, but that does not make the state's policy constitutional. Alabama would bear the burden of proof on this *Mt. Healthy* argument, but more importantly, it makes no sense to apply *Mt. Healthy* to redistricting – and the Court has never done so. Unlike an employment decision involving a single individual, redistricting involves hundreds of interlocking decisions.

The counterfactual policy Alabama would have employed to get to the "same" outcome in district A would have to be a policy the state would have applied in a consistent, non-pretextual way to all other districts in the state. A policy of keeping counties intact to the maximum extent possible might produce in district A the "same" black population level, but it would also change the design of that district along many other important dimensions; just as significantly, it would also change the design of other districts. No intelligible way exists to apply *Mt. Healthy* to redistricting, at least when as many districts are at issue as here.

3. The Ability-to-Elect Defense. To salvage its policy, Alabama now attempts to rationalize it as if the policy reflected a considered judgment on BPP levels that were actually needed to preserve the ability to elect. The state asserts it *relied* on the "best evidence" for that judgment, AL Br. 71; in reality, the state adopted a preclearance "strategy" to use these

racial targets, whether actually necessary for the ability to elect or not.

But accepting the state's effort to convert its pure-numbers policy into a judgment about the ability to elect, there is no strong basis in evidence that Alabama's policy is justified in these terms.

Because the state used different numbers in different districts, it is not altogether clear *what* the actual policy is for which Alabama believes it had a strong basis in evidence. In describing the "best evidence" it relied on, the state suggests several times it applied a 65% rule. AL Br. 71.

Alabama claims to have relied, in part, on "caselaw" for this view. But to the extent the courts or DOJ once applied a 65% rule, doing so was necessary decades ago to compensate for lower black registration and turnout rates. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1415 (7th Cir. 1984) ("[The 65%] figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out, for a total increment of 15%."). It has been decades since courts applied anything like a 65% rule. *See, e.g., Metts v. Murphy*, 347 F.3d 346, 356 (1st Cir. 2003) ("By 1990, fifty-five percent was generally considered sufficient" [for the ability to elect.]), *vacated on other grounds en banc*, 363 F.3d 8 (1st Cir. 2004).

Moreover, a 65% rule in Alabama in 2012 self-evidently lacks justification. Although Alabama tells the Court how much has changed there, the state

ignores this point when it comes to asserting such high BPPs remain functionally necessary.

Black registration has exceeded that of whites in the last presidential and mid-term elections and has been roughly equal to white registration over the last decade; black turnout has exceeded white turnout in all elections since 2004, except in 2006, when it was only 1.8 percentage point below white turnout. Gaddie Br. If a 65% district was necessary at some point in the past, a 53% district would be the rough equivalent in Alabama today (3 points must be added to 50% for the relatively larger size of the black community's non-voting age population). When the 1990s districts were created, in contrast, black registration and turnout were a combined 16.6 points below that of whites – an ability-to-elect district back then might well have required a 69.6% district.[8]

But to suggest such a district is necessary today is insupportable. Indeed, the Redistricting Committee's own lawyer, now-Deputy Attorney General Dorman Walker, publicly stated that the 65% figure was a relic of the past and that DOJ might even consider 55% too extreme today. ADC Br. 10-11. The redistricters apparently ignored his legal view.

Alabama asserts that the "plaintiffs introduced almost no evidence below to show" that BPPs below

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[8] 50% + 16.6 + 3 (for the younger black population, using today's figure for that). Figures in this paragraph are for general illustrative purposes, not as assertions above the levels actually required.

65% were sufficient. AL Br. 70. But as Walker's statement indicates, it takes no sophisticated analysis to know 65% is not necessary. Surely Alabama's legislative leaders recognize that black registration and turnout rates today are on par with those of whites; their amicus brief in this case, indeed, makes that point at length. Indeed, Sen. Dial testified that he knew the 75.2% black majority in SD 26 was unnecessary. ADC Br. 15. In any event, ADC did offer two experts whose analyses showed that 65% BPP districts were not necessary (the state did not introduce any expert analysis on this question). JA 142-45; JS App. 86-88 (Lichtman testimony that below 50% can be adequate); JS App. 91 (Arrington testimony that 54-56% is sufficient).[9]

But the issue is *not* what levels of BPP are actually necessary in fact. The issue is that Alabama (1) made no judgment at all but just simply reproduced BPP numbers that (2) were at such high levels in many districts that, on their face, those levels were not necessary. After the plans were enacted, the ADC's witnesses at trial varied a bit on how low the

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[9] The court did not credit this testimony because in a 2000 Alabama local-government case, Dr. Arrington had testified that higher levels were necessary (as he explained at the time in that case, "blacks were not mobilized to vote at the same rate as whites. "). *Wilson v. Jones*, 130 F. Supp. 2d 1315, 1320 (S.D. Ala. 2000). In rejecting Dr. Arrington as inconsistent, the court lost sight of the fact that black registration and turnout in the 1990s were significantly lower than those of whites. See Pol. Sci. Am. Br.4, 8.

BPP could be and still preserve the ability to elect, but Alabama could not have relied on those views;[10] nor, in picking and choosing among them can Alabama find support for the claim that, had it considered the ability to elect, the state would have chosen essentially the same levels its fixed BPP policy created.

Similarly, ADC's alternative plans do not determine whether Alabama's policy is itself constitutional. But in any event, the state obscures crucial differences between the ADC's plans and the enacted ones that illustrate the elimination of coalitional districts and the intentional creation of unnecessarily packed ones. In the House, for example, the ADC plan creates 3 districts between 35-50% BPP, which is precisely the range in which black-white political coalitions elect candidates of choice the minority community largely supports; the enacted plan has no districts in this BPP range. Instead, the state plan has 12 districts at 65% BPP or higher; the ADC plan only has 6 such districts. The ADC's plans were produced during the redistricting process for the legislature, not for litigation; the plans were designed to be palatable to the Republican legislature while persuading it to respect the integrity of

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[10] Dr. Reed thought 60% BPP today was ordinarily enough for the ability to elect, JA 51; the social scientist, Dr. Lichtman, testified that he "would absolutely disagree" with the view that even 60% districts are necessary. JA 66.

county boundaries by showing how much better the longstanding 10% population deviation rule would do that. They were not designed as the ADC's ideal plans, nor as trial exhibits to show the effects of a race-neutral plan that preserved the ability to elect without excessively concentrating black voters.

II. Remedy: The Court Should Invalidate the Plans

1. The state's unconstitutional policy was applied to all 36 majority-black House and Senate districts. While an appropriate remedy might be to invalidate only those districts, the more appropriate remedy here is to invalidate the plans as a whole. Some districts were moved to completely different parts of the state because their black populations had to be drained to meet the state's BPP quotas in other districts; HD 53 was moved from the center of the state, in Birmingham, all the way up to the border with Tennessee; HD 73 was moved from Montgomery over to Shelby County. If the state had acted constitutionally, it is impossible to know whether those districts would have stayed where they were or in what form. What would an order to re-design HD 53 without the offending policy mean – to re-draw it in Birmingham, where it might have remained absent that policy, or in Madison, where it now sits?

Problems of this sort are endemic with any effort to craft a surgically targeted remedial order when all black-majority districts were designed pursuant to an

unconstitutional policy. ADC recognizes that federal remedies in redistricting cases should not "'intrude upon state policy any more than necessary.'" *White v. Weiser*, 412 U.S. 783, 795 (1973) (citation omitted). But in this context, the most appropriate remedy would be to require the plans to be redrawn, through constitutional means and in compliance (now) with Section 2 of the VRA.

2. Against this remedy, Alabama might be taken to be making a severability argument – an implicit suggestion that the Court should hold the fixed BPP policy constitutional as applied to districts in which those BPPs are in fact necessary to preserve the ability to elect. But the Court does not generally sever statutes that rest on constitutionally forbidden purposes or justifications. Severance is appropriate for statutes that are overbroad, not ones lacking a constitutionally legitimate justification. *See, e.g., Hunter*, 471 U.S. 222 (not severing law enacted for racially-discriminatory purposes between crimes for which blacks were and were not disproportionately convicted); *see also United States v. Lopez*, 514 U.S. 549 (1995) (facially invalidating congressional statute without severing for cases that had a sufficient inter-state jurisdictional nexus).

Shelby County, which rejected a similar argument to the one Alabama makes here, exemplifies the point: the Court rejected any effort to hold Section 4 of the VRA constitutional as applied to Shelby County, even if Section 4 might be unconstitutional as applied to other covered jurisdictions. *Shelby Cnty. v. Holder*,

133 S. Ct. 2612, 2659 (2013). In the majority's view, Section 4 was unconstitutional in all its applications because Congress had not provided a rational or legitimate justification for it. The fixed BPP "formula" Alabama employed here lacks a constitutionally legitimate justification, which makes severance inappropriate.

3. The United States suggests three reasons a remand is appropriate. The first appears to be uncertainty about whether Alabama applied its policy in all black-majority districts. We have demonstrated already why no need exists for a fact-finding remand on that question. Second, the United States argues that district-specific litigation is required to determine if Alabama's policy subordinated traditional districting principles in specific districts. But ADC's claim is that the *policy* itself is unconstitutional. Third, the United States suggests a remand to determine what BPP levels are necessary for the ability to elect. But no additional facts on that are required to hold Alabama's policy unconstitutional. The state's policy was simply to re-create BPPs, at whatever level, without any regard for the ability to elect.

III. The ADC Appellants Have Standing

Contrary to Alabama's view, ADC's challenge does not present a generalized grievance. The appellants claim that Alabama *applied* a fixed BPPs policy, to the extent possible, in all black-majority districts. Appellants have suffered relevant injury-in-fact fairly traceable to this BPP policy, which is redressable

by designing districts and plans that do not apply unconstitutional racial targets. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). To the extent any questions exist concerning the appropriate scope of remedy for the constitutional violation, those issues go not to standing, but to remedy.

A. Individual Appellants and ADC's Members Suffer Concrete Cognizable Injury

The state does not dispute that ADC has some members living in the black-majority districts. ADC has members in virtually every county, JA 183, and eleven of those counties are themselves fully contained within three of the eight majority-black Senate districts, ADC Br. 59; the same eleven counties are fully contained within one or more majority-black House districts. JA 195.

In addition, the Chair of the ADC, Dr. Reed, resides in SD 26 and HD 77, the same House District as named plaintiff Stallworth.[11] Alabama asserts residents in HD 77 were not injured, because the district's BPP dropped from 73.5% to 67.0%, as if this suggests the racial targets were not applied in this district. But they were; Alabama's policy was to come "as close as possible" to the prior numbers.[12]

---

[11] Dr. Reed's address is in the record and the resulting district he is in is a matter of public record. ADC Br. 60 n.28.

[12] The ADC plaintiffs who resided in HD 73, ADC Br. 60, have standing as well; Hinaman eliminated HD 73 to sort voters by race into HDs 77 and 78 to meet 70%+ BPP targets there.

(Continued on following page)

Alabama also does not dispute that the only reasonable inference from the record is that ADC has members in numerous other majority-black districts as well. ADC Br. 60. *Lujan*, 504 U.S. at 561 (elements of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. . . ."). Indeed, the state never argued that ADC had to prove members in the black-majority districts, perhaps for that reason.[13] Facts about the district residences of ADC members were not "controverted" at trial. *See* id. at 561 (standing "facts (*if controverted*) must be 'supported adequately by the evidence adduced at trial.'") (emphasis added, citation omitted). However, in an abundance of caution, ADC has lodged a supplemental affidavit providing approximately 70 relevant district residence addresses from among its more than 3,000 members.[14]

United States v. Hays, 515 U.S. 737 (1995), did not bar all claims by non-residents of black districts, but required that such residents produce *specific* evidence that members of their district had been classified by race. The facts about HD 73 provide that evidence.

[13] The state misleadingly suggests it did, citing to JA 205, but all the state argued there was that no named plaintiff lived in one specific district – SD 11, a white-majority district. The state argued only that ADC members had to be joined on the theory that ADC's claim "requires the participation of the individual ADC members." AL Br. 68. The district court did not accept that view. Having challenged residency with respect to only one district, Alabama can hardly complain about the lack of detailed evidence regarding the others.

[14] ADC's letters in support of that lodging provide the full procedural history regarding the standing issue that justifies this lodging.

Alabama asserts that ADC lacks standing to represent its members because it "never made a claim on behalf of its individual members." AL Br. 68. But the state cites no authority for the position that when an organization sues, it is required to make such a further assertion, and the court below plainly understood ADC to be asserting representational standing on behalf of its members.

B. In addition, ADC Suffers Organizational Injury-In-Fact

ADC also has standing in its own right. *See* ADC Br. 54-58. The state does not dispute that ADC pressed this organizational standing argument below or that the court simply neglected to address it. Accordingly, remand on this issue might be appropriate.

In any case, the state's objections to ADC's organizational standing are misplaced. First, Alabama's position appears to be that organizations can never have standing to enforce "personal rights," because people, not organizations, possess such rights. AL Br. 64. But this Court has never endorsed such a principle and has recognized organizational standing, including in voting-rights cases.

In *Crawford v. Marion County Election Board*, 553 U.S. 181, 189 n.7 (2008), for example, the Court recently agreed that the state and local Democratic Party had standing to challenge Indiana's voter-identification law as a violation of the Fourteenth

Amendment's protections for the personal "right to vote." But the Indiana Democratic Party does not vote. Similarly, the Court found organizational standing in *Havens Realty Corp v. Coleman*, 455 U.S. 363 (1982), even though the fair-housing organization there could not suffer the personal injury of race discrimination. Citing *Havens,* Judge Posner for the court of appeals in *Crawford* upheld the Democratic Party's organizational standing because "the new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." 472 F.3d 949, 951 (7th Cir. 2007). This Court affirmed the standing holding.[15]

Alabama's insistence that ADC cannot establish organizational standing because it is not a person confuses Art. III standing with prudential third-party standing issues. Alabama has not raised such issues; in any event, the circumstances in which the Court generally grants third-party standing are present here. *See Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004) (ADC has a "close" relationship with its members and there are considerable hindrances to those members litigating these claims as individuals).

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[15] As a secondary holding, the court of appeals concluded that the Democratic Party also had standing to assert the rights of those members the law injured.

Second, Alabama asserts that ADC's harm is not fairly traceable to the challenged policy. AL Br. 67. But the ADC is in the same position as the Democratic Party in *Crawford*. Dr. Reed's affidavit details those tangible injuries, including those caused by the plans' splitting of precincts. JA 182; JS App. 77-78. Alabama asserts those tangible costs are not "fairly traceable" to its BPP policy, because they stem from the 2% rule, but Hinaman specifically testified to splitting at least some precincts to meet the BPP policy. Tr. III at 143-44. Second, Dr. Reed's testimony, consistent with ADC's complaint, states that "it is so crucial for us to be able to influence districts. That's where you get your white allies from." Tr. II at 171. The state's policy perceptibly impairs ADC's ability to develop and engage in interracial political coalitions, a core part of its mission. These harms are not abstract ideological or remote ones, but concrete, immediate, and particularized. *Havens,* 455 U.S. at 379.

Finally, *Hays* does not single out racial redistricting cases for a special bar on organizational standing. First, *Hays* simply does not address any issue concerning organizational standing. Second, the substantive claims here are analytically distinct from those in *Shaw* and *Hays*. *Shaw* rejected on the merits the claim that merely taking race into account is itself unconstitutional.

This case involves a different and distinct claim. Alabama's policy does not merely take race into account, it sets unjustifiable racial-population targets.

ADC's claim that this policy, in itself, is unconstitutional is a more conventional Equal Protection challenge to a race-based policy. *See Miller v. Johnson*, 515 U.S. at 913 (" . . . *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases."). No constitutional bar to ADC's organizational standing is present.

* * *

This case is ultimately about whether states (in good faith or bad) will unnecessarily turn the VRA into a racial straightjacket and, perversely, into a barrier to interracial political coalitions. In *Bartlett*, this Court warned that "[o]ur holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns." *Bartlett v. Strickland*, 556 U.S. 1, 23-24 (2009). Alabama went far beyond that here: it entrenched black population numbers, purely as numbers, without any regard for whether doing so was necessary to preserve the ability to elect and without a strong basis in evidence for such a position. Section 5 does not require that. The Equal Protection Clause does not permit it.

CONCLUSION

Appellants respectfully request that the Court reverse the judgment below.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 13-895 and 13-1138

In the Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL.,
APPELLANTS

v.

STATE OF ALABAMA, ET AL.

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,
APPELLANTS

v.

STATE OF ALABAMA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTIONS PRESENTED

This brief addresses the following questions:

1. Whether the district court erred when it rejected claims that Alabama's redistricting plans drew district lines based predominantly on race.

2. Whether the district court erred when it determined that Alabama's use of race, even as a predominant districting criterion, was nevertheless narrowly tailored to achieve the compelling interest of complying with the Voting Rights Act of 1965.

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In the Supreme Court of the United States

No. 13-895

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL., APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

This case involves the constitutionality of redistricting plans that Alabama has defended, in part, on the grounds that the plans were designed to comply with the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437 (42 U.S.C. 1973 *et seq.*) The United States, acting through the Department of Justice, has a direct role in the VRA's enforcement. Accordingly, the United States has a substantial interest in the proper interpretation of both the VRA and the

related constitutional protections against racial discrimination.

STATEMENT

1. The drawing of legislative districts is a quintessential state sovereign function. See, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995); *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964). Both the Constitution and federal statutory law, however, impose constraints on States' redistricting to prevent racial discrimination.

The Equal Protection Clause "prevent[s] the States from purposefully discriminating on the basis of race." *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*). State reapportionment statutes generally do not, by their terms, discriminate on the basis of race, because they typically draw lines between "tracts of land, or addresses," not between people. *Id.* at 646. But if race is the "dominant and controlling" or "predominant" consideration in a legislature's decision "to place a significant number of voters within or without a particular district," that use of race must be "narrowly tailored to serve a compelling state interest." *Shaw* v. *Hunt*, 517 U.S. 899, 902, 905 (1996) (*Shaw II*) (citation omitted); see also, *e.g.*, *Miller*, 515 U.S. at 913, 916. A plaintiff may show that race was the "predominant factor" in drawing a particular district "either through circumstantial evidence of a district's shape and demographics," or through more direct evidence showing that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Ibid.*

The VRA imposes additional obligations on States concerning the consideration of race in redistricting. Using its authority to enforce the Fourteenth and Fifteenth Amendments, Congress enacted the VRA to remove "the blight of racial discrimination in voting" that persisted after those amendments took effect. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Section 2 of the VRA prohibits any jurisdiction from implementing voting practices that, based on the totality of circumstances, result in a racial minority or other protected class "hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

In addition, Section 5 of the VRA created a preclearance regime for a limited set of jurisdictions identified in Section 4 of the Act. See 42 U.S.C. 1973b(b). Section 5 requires covered jurisdictions to obtain preclearance of changes to electoral practices, including districting changes, from either the Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. 1973c(a). To obtain preclearance, a covered jurisdiction must demonstrate that a proposed change does not have the purpose and will not have the effect of discriminating based on race. *Ibid.* A measure cannot receive preclearance when it has the effect of "diminishing the ability of any citizens of the United States on account of race or color * * * to elect their preferred candidates of choice." 42 U.S.C. 1973c(b). At the time of the redistricting measures at issue in this case, Alabama was subject to Section 5. In *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), however, this Court held that the coverage formula in Section 4(b) of the

VRA could no longer be used as a basis for requiring preclearance under Section 5. In light of *Shelby County*, Alabama is not currently required to comply with Section 5.

2. Alabama's bicameral legislature is divided into 35 Senate districts and 105 House districts. 13-895 J.S. App. 17 (J.S. App). The legislature represents a population 67% of whom identify as white non-Hispanics and 26% of whom identify as black, according to the 2010 census. *Id.* at 15. African-Americans constitute a majority of the population in the south-central region of the State. *Id.* at 19.

In 2010, after an election cycle that gave Republicans control of both houses of Alabama's legislature, state legislators developed a plan for redistricting based on the decennial census data. J.S. App. 5. The data revealed that many of the existing districts were significantly malapportioned, requiring their boundaries to be redrawn in order to comply with constitutional requirements of equal apportionment. In particular, the 2010 census showed that 80 of the State's 105 House districts and 24 of the State's 35 Senate districts deviated from an equal population standard by more than 5 percent. *Id.* at 17-19. The malapportionment was particularly severe in Alabama's majority-black districts, all of which were underpopulated. *Id.* at 18-19. Indeed, nine of the 27 majority-black House districts and two of the eight majority-black Senate districts were underpopulated by more than 20%. *Ibid.* This malapportionment reflected both population shifts since the last census and the fact that the State's prior districting plans—adopted when both Houses of the legislature were controlled by Democrats—had generally underpopu-

lated majority-black districts and overpopulated nearby majority-white districts. *Id.* at 20; see *id.* at 15-17.

Alabama's legislature retained a consultant to draw district lines in accordance with principles the legislature established. The legislature determined that no district's population should exceed that of any other district by more than two percent. See J.S. App. 27-28. This rule required closer adherence to a "one person, one vote" standard than prior plans, which had permitted district populations to vary by as much as ten percent. *Ibid.*

The legislature also required that "districts be drawn in accordance with the [VRA], be contiguous and reasonably compact, be composed of as few counties as practicable, avoid contests between incumbent members whenever possible, and respect communities of interest." J.S. App. 27. In cases of conflict between objectives, the legislature designated the top priorities to be compliance with "one person, one vote" rules and compliance with the VRA. *Id.* at 27-28. The legislators with principal roles in the redistricting process and the legislature's consultant understood Section 5 of the VRA to prohibit the "reduction in the number of majority-black districts or a significant reduction in the percentage of blacks in the new districts as compared to the 2001 districts." *Id.* at 33.

The State's final redistricting plans contained the same number of majority-black districts as the State's prior plans. Most of those districts retained approximately the same percentage of black residents. See J.S. App. 47, 53. In some, the match was quite precise: 13 of the 27 majority-black House districts and three of the eight majority-black Senate districts came within one percentage point of maintaining the

same percentage of black residents. *Id.* at 228 (Thompson, J., dissenting); see *id.* at 47. House Districts 52 and 55—with total populations of just over 45,000—came within 2 and 12 black residents, respectively, of achieving an identical percentage of black residents. *Id.* at 208 (Thompson, J., dissenting). Other majority-black districts, however, saw significant changes in their ethnic composition, with the percentage of black residents in seven majority-black House districts and four majority-black Senate districts either increasing or decreasing by more than five percent. See Alabama Legislative Black Caucus Br. 5a-7a.

In repopulating the majority-black districts, the plans moved over 120,000 black residents into majority-black House districts and over 106,000 black residents into majority-black Senate districts. J.S. App. 195-197 (Thompson, J., dissenting). These figures represented, respectively, 19.7 percent and 15.8 percent of the State's black residents who did not already reside in majority-black districts for the legislative branch at issue. *Ibid.*

In largely party-line votes, both the House and Senate redistricting plans were enacted in May 2012. J.S. App. 58-59.

Because Alabama was covered by Section 5 of the VRA at the time of the plans' enactment, the plans were submitted to the Attorney General for preclearance. After analyzing the plans to determine whether they had the purpose or effect of denying or abridging the right to vote as proscribed by Section 5, see *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7470 (Feb. 9,

2011) (2011 Guidance), the Attorney General interposed no objection to the plans. J.S. App. 8.[1]

3. Appellants brought suit to challenge the redistricting plans. One suit was brought by the Alabama Legislative Black Caucus, an organization of African-American state legislators, along with several individual plaintiffs. 13-895 J.S. ii; J.S. App. 8. A second suit was brought by the Alabama Democratic Conference, an African-American political organization, joined by several individual plaintiffs. 13-1138 J.S. ii; J.S. App. 9. Each suit alleged, among other claims, that Alabama's redistricting plans drew district lines based predominantly on race, in violation of the Equal Protection Clause. See J.S. App. 13-14.

4. a. Following a bench trial, a three-judge district court rejected appellants' challenges, including their claims under the Equal Protection Clause. The court construed each of the lawsuits as alleging that the redistricting plans "as a whole constitute racial gerrymanders," and it understood the Democratic Conference appellants to also challenge four particular Senate districts on that ground. J.S. App. 128.

In addressing appellants' equal protection claims, the district court turned first to standing. It noted that a plaintiff bringing a racial gerrymandering claim must generally show that he or she resides in the district being challenged. J.S. App. 135-136. Applying this rule, it found that the Democratic Conference appellants lacked standing because they had not of-

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[1] Consistent with Section 5 of the VRA and accompanying regulations, the Attorney General did not consider whether the plans violated any statutory or constitutional provision other than Section 5, such as Section 2 of the VRA or the Equal Protection Clause. See 2011 Guidance 7470.

fered evidence that organization members resided in any of the challenged districts. *Id.* at 138. The court concluded, however, that the Black Caucus appellants had standing to challenge the redistricting plans because the Black Caucus—which is "composed of every African-American member of the [Alabama] House and Senate"—has members in all majority-black districts in the State. *Id.* at 136 (citation omitted).

Turning to the merits, the district court rejected appellants' equal protection challenges on the ground that "[r]ace was not the predominant motivating factor" for the redistricting "[a]cts as a whole." J.S. App. 140. The court reasoned that the legislature had sought to balance a number of objectives, including adhering to the State's equal-population requirements; complying with the VRA; protecting incumbents; and preserving communities of interest. *Id.* at 146-147. Race did not predominate among these objectives, the court concluded, because "the constitutional requirement of one person, one vote trumped every other districting principle." *Id.* at 151; see also *id.* at 147-152. The court further concluded that evidence that the legislature had generally "maintained the cores of existing districts, made districts more compact where possible, kept almost all of the incumbents within their districts, and respected communities of interest where possible" demonstrated that the legislature "was not predominantly motivated by racial considerations." *Id.* at 144. The court also noted that in some districts the black population had dropped substantially, indicating that the legislature had not prioritized maintaining the percentage of black residents above all other objectives. *Id.* at 154.

Although the district court had found the Democratic Conference appellants lacked standing, it conducted a district-by-district analysis of the four Senate districts that were the focus of the Democratic Conference challenge, only one of which was a majority-black district. The court found that race did not predominate with respect to those districts because population equality, partisan objectives, and protection of incumbents best explained the changes to those districts. See J.S. App. 166-173.

The district court also concluded that even if race had been the predominant factor in Alabama's redistricting plans, the use of race had been permissible because it was narrowly tailored to serve the compelling interest of compliance with Section 5 of the VRA. J.S. App. 173-174. The court explained that race had been used only to "preserve[], where feasible, the existing majority-black districts and maintain[] the relative percentages of black voters in those majority-black districts." *Id.* at 181-182. The court understood each of these objectives to be required by Section 5 of the VRA. *Id.* at 183. Because it found any use of race justified under Section 5, the court did not address Alabama's further contention that the State's use of race was justified to comply with Section 2 of the VRA.

b. Judge Thompson dissented. J.S. App. 188-275. Judge Thompson found substantial evidence that race had predominated in drawing at least a significant number of Alabama's majority-black districts. He emphasized that the legislators chiefly responsible for the redistricting had prioritized maintaining the same percentage of black voters in each majority-black district for the stated purpose of complying with Sec-

tion 5—a goal he described as maintaining "racial quotas." See *id.* at 192-194, 213-216. He noted that several districts came within a few individuals of the number needed to maintain the same percentage of black residents as existed under the prior redistricting plans. *Id.* at 230; see *id.* at 208.

Judge Thompson wrote that this level of precision required extraordinary measures. For example, malapportionment required a substantial repopulation of Senate District 26. Despite what Judge Thompson described as the "racially mixed demographics of the areas" surrounding the district, J.S. App. 239, of the 15,785 people added to the district, 14,806 were black, and only 36 were white, *id.* at 201. Judge Thompson also pointed to evidence that the legislature had disregarded certain incumbent preferences, moved certain districts, and split precincts. *Id.* at 232-243. Judge Thompson found the splitting of precincts particularly indicative of a "racial methodology," because data was available at the census block level for race but not for political affiliation, so that when the consultant split a "'massive' number of precincts," he "could not have done so based on how many Democrats or Republicans lived in each census block" but must have looked instead to "racial data." *Id.* at 234.

While acknowledging that not every majority-black district retained the same percentage of black residents, Judge Thompson concluded that the evidence of race-based gerrymandering required "an individual assessment for each district as [to] whether race was a predominant factor" in drawing the district's boundaries. J.S. App. 227.

Judge Thompson also dissented from the majority's conclusion that Section 5 of the VRA had justified any

use of race as a predominant factor in Alabama's redistricting. That view, he argued, misunderstood the VRA. Rather than barring every redistricting change which reduces the proportion of minority voters in a district, Judge Thompson wrote, Section 5 barred only changes that functionally diminished the ability of minority groups to elect their candidates of choice. J.S. App. 253-261. He also concluded that Alabama could not rely on Section 5 to justify its redistricting plans because, after the redistricting plans were enacted, this Court invalidated the coverage formula that had made Alabama subject to Section 5. *Id.* at 267-269 (discussing *Shelby County*). Like the majority, Judge Thompson did not address whether any use of race was justified to comply with Section 2 of the VRA.

SUMMARY OF ARGUMENT

The district court misconstrued the Equal Protection Clause and the VRA when it upheld Alabama's 2012 redistricting plans in their entirety. The court's decision should be vacated, and the case should be remanded for the fact-intensive district-by-district analysis necessary to determine whether race predominated in the drawing of particular district lines and, if so, whether that use of race was narrowly tailored to comply with the VRA.

I. The district court made fundamental mistakes in analyzing whether Alabama used race as a predominant consideration in drawing legislative districts.

A. The district court erred in assessing only whether race was the predominant factor in Alabama's redistricting plans "as a whole," rather than performing a district-by-district analysis. When race is the "predominant factor" motivating a legislature to place

a significant number of residents inside any single legislative district, unless that use of race satisfies strict scrutiny, the voters within that district suffer a constitutional injury, even if race does not play a significant role in defining other districts within the State. Accordingly, courts must analyze whether traditional districting principles were subordinated to race in drawing particular districts—not just whether race predominated in a plan as a whole.

B. The district court further erred in concluding that race could not have predominated in Alabama's redistricting because Alabama prioritized compliance with the requirement of "one person, one vote" over other districting principles. The constitutional requirement that districts have approximately equal populations is a background rule that applies in every redistricting. Even if all the State's districts are of equal size, race predominates if race was used in disregard of traditional districting principles to determine which residents to allocate to particular districts.

C. Determining whether race predominated in drawing those districts that are properly challenged in the appellants' suits requires an analysis of each challenged district to assess the roles of race and of other considerations in drawing boundaries. Here, evidence suggests that race may have predominated in drawing some districts. Key legislators appear to have prioritized maintaining the same percentage of black residents in majority-black districts as had existed in the prior redistricting plans. And the precision with which the legislature achieved that objective strongly suggests an overreliance on race. Nevertheless, a remand is appropriate so that the district court may in the first instance make the fact-intensive determina-

tion of whether these results were achieved in disregard of traditional districting principles in individual districts.

II. The district court's alternative conclusion that any use of racial classifications in Alabama's plans satisfied strict scrutiny should also be vacated, because it rests on a misunderstanding of Section 5 of the VRA.

A. Contrary to the district court's view, Section 5 does not bar every districting change that reduces the percentage of minorities in a majority-minority district. Section 5 prohibits only changes that diminish a minority group's existing ability to elect a candidate of choice. The court therefore erred in concluding that Section 5 justified Alabama's effort to maintain the same percentage of black voters in each majority-black district, without analysis of whether that step was a narrowly tailored means of protecting black voters' ability to elect their candidates of choice in those districts.

B. 1. This Court's precedents counsel in favor of permitting the district court to determine, in the first instance, whether use of race in Alabama's redistricting would have been narrowly tailored to satisfy strict scrutiny, assuming that compliance with Sections 2 and 5 of the VRA constitutes a compelling interest. Adherence to that approach is particularly appropriate here because proceedings in the district court may obviate the need to decide whether Alabama can invoke Section 5 to justify its 2012 redistricting plans in the wake of *Shelby County*.

2. If this Court elects to address the strength of Alabama's interest in complying with the VRA before any remand, it should decide that at the time of Ala-

bama's 2012 redistricting, the narrowly tailored use of race to comply with Sections 2 and 5 of the VRA could satisfy strict scrutiny, notwithstanding the Court's subsequent decision in *Shelby County*. The strict scrutiny standard affords States some leeway to use narrowly tailored racial classifications when a strong basis *in evidence* supports the view that the classification is necessary to serve a compelling state interest. When the Alabama legislature enacted its redistricting plans in 2012, strong evidence supported its conclusion that compliance with Section 5 required that race be taken into account in drawing some district boundaries. And even apart from Section 5, strong evidence supported the conclusion that Section 2 required that race be taken into account.

3. On remand, the district court should determine whether race predominated over traditional districting principles in any of the challenged Alabama districts, and if so, whether that use of race was narrowly tailored to achieve compliance with the VRA. At least for some districts, it is questionable whether the State had a strong basis in evidence to believe that Section 5 required maintaining the same percentage of black voters as existed in the prior redistricting plan. But a determination of whether Alabama could properly use race as a predominant consideration in drawing any of the challenged districts will require resolution of open disputes of fact. The court will need to make findings regarding the population levels needed to preserve black voters' ability to elect their candidates of choice and concerning whether traditional districting principles were subordinated more than was necessary to achieve compliance with the VRA in particular dis-

tricts. These questions are appropriately resolved in the first instance by the district court on remand.

ARGUMENT

I. THE DISTRICT COURT FAILED TO PROPERLY DETERMINE WHETHER RACE PREDOMINATED IN DRAWING THE BOUNDARIES OF APPELLANTS' LEGISLATIVE DISTRICTS

The district court's judgment should be vacated because the court did not properly determine whether traditional districting principles were subordinated to race in drawing Alabama's districts. First, the court failed to undertake the required inquiry into whether race predominated in drawing the lines of the particular districts that the appellants had standing to challenge, instead determining that race did not predominate in the redistricting plans as a whole. Second, the court erred in concluding that race did not predominate because the legislature prioritized the creation of districts of approximately equal population over consideration of race. Here, evidence in the record indicates that race may have predominated in the drawing of at least some districts. Nevertheless, because a proper analysis of the challenged districts will require a fact-intensive review typically performed by district courts in the first instance, the case should be remanded.

A. The District Court Erred By Failing To Determine Whether Race Was The Predominant Consideration In Setting The Boundaries Of Individual Districts

The district court erred when it assessed the appellants' equal protection claims by determining whether race was the predominant factor motivating the drafting of the redistricting plans "as a whole." See, *e.g.*,

J.S. App. 128, 140. An equal protection violation occurs when "race was the predominant factor motivating the legislature's decision to place a significant number of voters *within or without a particular district*," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995) (emphasis added), whether or not race was the predominant factor for an entire statewide plan. Accordingly, when confronted with challenges to the use of race in redistricting, a court "must scrutinize *each challenged district* to determine whether * * * race predominated over legitimate districting considerations." *Bush* v. *Vera*, 517 U.S. 952, 963 (1996) (plurality opinion) (emphasis added). This Court has performed these district-by-district assessments even in the presence of evidence that the plan drafters had overarching statewide goals relating to race. See *id.* at 965-975; see also, *e.g.*, *Miller*, 515 U.S. at 917; *Shaw* v. *Hunt*, 517 U.S. 899, 904-907 (1996) (*Shaw II*); *Hunt* v. *Cromartie*, 526 U.S. 541, 547 (1999).

This district-by-district analysis is dictated by the nature of the constitutional harm at issue. When a voter is placed in a particular district drawn predominantly based on race, absent a narrowly tailored compelling interest, the voter suffers "fundamental injury" from governmental "racial classification." *Shaw II*, 517 U.S. at 908 (quoting *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 661 (1987)); see also *Vera*, 517 U.S. at 957 (plurality opinion) (describing *Shaw* harm as being "personally * * * subjected to [a] racial classification"). The voter also suffers a "representational harm[]," *United States* v. *Hays*, 515 U.S. 737, 747 (1995), because legislators elected in districts drawn along racial lines "are more likely to believe that their primary obligation is to represent only the members

of" a particular racial group, "rather than the constituency as a whole," *Shaw* v. *Reno*, 509 U.S. 630, 648 (1993) (*Shaw I*). A voter in a district drawn based predominantly on race suffers these injuries whether or not race was used so pervasively in *other* districts that race predominated in the plan as a whole.

An analysis of whether race predominates in a plan "as a whole" is overbroad, as well, because it enables plaintiffs to challenge districts in which they do not themselves reside. When plaintiffs live in a district where race has predominated over traditional districting principles, they "have standing to challenge that part of" the redistricting plan, *Shaw II*, 517 U.S. at 904, because they have "been denied equal treatment because of the legislature's reliance on racial criteria." *Hays*, 515 U.S. at 745. Permitting challenges to a plan "in its entirety," however, would enable plaintiffs to challenge district lines that cause the plaintiffs themselves no cognizable injury, because "where a plaintiff does not live in" a district drawn along racial lines, "he or she does not suffer those special harms" that confer standing. *Id.* at 745-746; see also *Sinkfield* v. *Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam) (rejecting "[a]ppellees' suggestion * * * that an unconstitutional use of race in drawing the boundaries of majority-minority districts necessarily involves an unconstitutional use of race in drawing the boundaries of neighboring majority-white districts").

This Court has adhered to a district-by-district approach even in prior cases in which there has been direct evidence of statewide race-related objectives. See *Vera*, 517 U.S. at 960-961, 970 (plurality opinion) (case involving "substantial direct evidence of the legislature's racial motivations" including explicit dec-

larations of intent to maximize the number of black majority districts); *Miller*, 515 U.S. at 910 (case where evidence of race-based districting was "practically stipulated by the parties") (citation omitted). That approach remains sound. It reflects the constraints of standing. And it ensures accurate adjudication, because while the record contains evidence that the legislature maintained the same percentage of black residents in certain majority-black districts in possible disregard of traditional districting principles, see, *e.g.*, J.S. App. 231-234 (Thompson, J., dissenting), legislators did not maintain the same percentage of black voters in every majority-black district, see *id.* at 227-228 (Thompson, J., dissenting). Thus, as the dissent below recognized, *id.* at 227, district-by-district review is appropriate to determine whether race predominated in the particular districts that the appellants have standing to challenge.

B. The District Court Erred By Concluding That Race Could Not Predominate If The Legislature Drew Districts Containing Approximately Equal Populations

The district court also erred in concluding that race could not have predominated in Alabama's drawing of district lines simply because "the constitutional requirement of one person, one vote trumped every other districting principle" in the 2012 redistricting. J.S. App. 151; see also *id.* at 147-148, 170.

That reasoning cannot be squared with this Court's decisions. The constitutional requirement that legislative seats "be apportioned on a population basis," *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964), trumps other districting objectives in *every* decennial redistricting—including each redistricting at issue in this Court's prior cases concerning race-based gerryman-

dering. See, *e.g.*, *Miller*, 515 U.S. at 920; *Vera*, 517 U.S. at 976 (plurality opinion); *Shaw II*, 517 U.S. at 906. Yet none of those cases treated compliance with one person, one vote as determinative of whether race predominated in the plans before the Court. Instead, the critical question was whether race had been placed above traditional districting considerations in determining *which* persons were placed in appropriately apportioned districts. See, *e.g.*, *Miller*, 515 U.S. at 916 (explaining that "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations"); *Shaw I*, 509 U.S. at 647. And several cases affirmed that race *did* predominate despite the absence of any suggestion that the States had failed in their obligation to draw districts "as nearly of equal population as is practicable," *Sims*, 377 U.S. at 577. See *Miller*, 515 U.S. at 917-920; *Shaw II*, 517 U.S. at 906-907. In sum, this Court's cases establish that race predominates over traditional districting principles if it is the primary criterion used in determining which citizens to allocate to a particular district—irrespective of whether that district was appropriately apportioned.

The district court's departure from this approach would fail to protect against the harms of unconstitutional racial classifications. This Court has explained that the "central purpose" of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race," *Shaw I*, 509 U.S. at 642, and voters are harmed if race predominates in drawing the districts in which

voters are placed without compelling and narrowly tailored justification. Yet the district court's rule would permit States to use race predominantly without justification, so long as they established districts of equal size. The district court's misapprehension of the framework for determining whether race predominates in a redistricting requires the district court's conclusion that race did not predominate in Alabama's redistricting to be vacated.

C. This Case Should Be Remanded For Application Of This Court's Precedents

A determination of whether race predominated in individual districts requires fact-intensive analysis that is best performed by the district court in the first instance. The record below contains evidence suggesting that race did predominate in the drawing of some majority-black districts. Key legislators regarded the maintenance of existing black population percentages in majority-black districts as necessary to comply with Section 5. See J.S. App. 27-28. For some districts, that objective was achieved with extraordinary precision. See *id.* at 208 (Thompson, J., dissenting) (noting districts within 2, 12, and 13 individuals of maintaining the same percentage of black voters). In addition, voters were moved into some districts in a manner that seemed guided by race: For example, in one district, only 36 out of 15,785 voters added to correct malapportionment were white. *Id.* at 201 (Thompson, J., dissenting). Further, the record contains evidence that suggests traditional districting principles were sometimes set aside. See *id.* at 231-234 (Thompson, J., dissenting). Analysis of the evidence concerning each district is nevertheless required because some majority-black districts deviated

significantly from the goal of maintaining the same percentage of black residents, see *id.* at 154, and because in some districts the percentage of black residents may have remained relatively constant based on boundaries drawn in a manner consistent with traditional districting principles. Cf. *id.* at 144 (noting evidence the legislature had generally "maintained the cores of existing districts, made districts more compact where possible, kept almost all of the incumbents within their districts, and respected communities of interest where possible").

This Court's cases suggest that the better course is for the district court to engage in the fact-intensive application of equal protection principles to particular districts in the first instance. See *Shaw I*, 509 U.S. at 658 (articulating governing legal framework and then remanding case to district court for initial application); cf. *Cromartie*, 526 U.S. at 553-554 ("[W]e are fully aware that the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General Assembly's motivations."). The Court should vacate the district court's opinion and remand for a district-by-district basis assessment of whether race predominated in the districts subject to challenge.

II. THE DISTRICT COURT ERRED IN ITS STRICT SCRUTINY ANALYSIS BECAUSE IT MISUNDERSTOOD THE REQUIREMENTS OF THE VOTING RIGHTS ACT

The district court concluded that, in the alternative, any use by Alabama of race as a predominant consideration in redistricting was justified under strict scrutiny, because it served the compelling interest of complying with the VRA. As explained below

(pp. 28-34, *infra*), compliance with both Section 2 and Section 5 of the VRA was a compelling governmental interest when Alabama adopted its 2012 redistricting plans. But the district court's conclusion that Alabama's use of race was required to comply with Section 5 misreads that provision, and the court failed to conduct any analysis of whether Alabama's use of race was required to comply with Section 2. The appropriate course under these circumstances is to remand the case for determination in the first instance of whether Alabama's use of race in any specific districts in which race predominated over traditional districting considerations was narrowly tailored to comply with the VRA.

A. The District Court's Strict Scrutiny Analysis Rested On A Misunderstanding Of The Voting Rights Act

The district court's strict scrutiny analysis should be vacated, because it rested on a mistaken understanding of Section 5. In particular, the district court was incorrect to conclude that Section 5 required the State to maintain the same percentage of black voters in each of the majority-black districts as had existed in the prior districting plans. Section 5 does not impose a categorical bar on "substantially reduc[ing] the relative percentages of black voters" in existing majority-black districts, see J.S. App. 183, much less does it require the precise maintenance of those relative percentages. Thus, assuming compliance with Section 5 would be a compelling interest, see pp. 28-34, *infra*, the district court's analysis does not support the conclusion that the challenged districts were a narrowly tailored means of advancing that interest.

Section 5 prohibits only those diminutions of a minority group's proportionate strength that strip the

group within a district of its existing ability to elect its candidates of choice. This Court has explained that Section 5's objective "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). Section 5 achieves this result by foreclosing districting changes that diminish minorities' ability to "elect their choices" of candidates. *Ibid.* (citation omitted) (describing inquiry as "whether the ability of minority groups to participate in the political process *and to elect their choices to office* is augmented, diminished, or not affected" by an electoral change) (emphasis added; prior emphasis omitted) (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975)); *Vera*, 517 U.S. at 983 (plurality opinion) (describing Section 5 as "mandat[ing] that the minority's *opportunity* to elect representatives of its choice not be diminished"). In construing this standard, the Court has rejected the view that Section 5 bars every change that reduces the minority population in a majority-minority district. See *City of Richmond* v. *United States*, 422 U.S. 358, 370-372 (1975) (rejecting Section 5 challenge to annexation plan that decreased the percentage of black voters within city in light of changed method of election).

Although the district court viewed 2006 amendments to the VRA as altering this standard to prohibit any reduction in the percentage of minorities in majority-minority districts, the 2006 amendments did not have this effect. Congress amended the relevant portion of Section 5 after this Court in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), departed from the abil-

ity-to-elect standard, concluding that instead "a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice" in determining whether an electoral change was retrogressive. *Id.* at 480. Congress disapproved of this decision, see Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 578, and reinstituted the ability-to-elect standard by providing that a voting practice "abridges the right to vote" if it "will have the effect of diminishing the ability of any citizens of the United States on account of race or color * * * to elect their preferred candidates of choice." 42 U.S.C. 1973c(b); see also 42 U.S.C. 1973c(d) (stating that added provision's purpose "is to protect the ability of such citizens to elect their preferred candidates of choice"). Because these revisions simply reinstituted the standard in effect prior to *Ashcroft*, they did not impose a standard—without any precedent in the pre-*Ashcroft* era—that bars any reduction of the percentage of minority voters in a majority-minority district. Indeed, leading proponents of those amendments explicitly disavowed such a reading. See, *e.g.* 152 Cong. Rec. 15,318 (2006) (statement of Sen. Leahy) (reducing the number of minorities in a district is perfectly consistent with * * * Section 5 as long as other factors demonstrate that minorities retain their ability to elect their preferred candidates"); *id.* at 15,322 (statement of Sen. Feingold) (concurring with Sen. Leahy).

Even if the statutory text were ambiguous, the district court's interpretation of Section 5 would be untenable. First, it is "implausible" that Congress

aimed to compel the maintenance of minority populations well above the level needed to elect a candidate of choice. See J.S. App. 253 (Thompson, J., dissenting). Such a rule would require the preservation of districts akin to the "packed" districts historically created to undercut minority groups' political participation. See, *e.g.*, *Johnson* v. *De Grandy*, 512 U.S. 997, 1007 (1994) (describing "packing"); *Shaw I*, 509 U.S. at 640 (describing "concentrating" black voters during Reconstruction). In addition, by requiring heightened consciousness of race in redistricting even when unnecessary to preserve the political stature of minority communities, such a rule might raise constitutional questions. Cf. *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 446 (2006) (*LULAC*) (opinion of Kennedy, J.) (noting that a reading of statute that "would unnecessarily infuse race into virtually every redistricting" would "rais[e] serious constitutional questions").

The district court believed that its view was consistent with the interpretation of Section 5 adopted by the Department of Justice (DOJ). J.S. App. 183; see also *id.* at 100, 149, 175. The district court, however, was mistaken. DOJ has issued guidance explaining that in determining "whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General *does not rely on any predetermined or fixed demographic percentages* at any point in the assessment." 2011 Guidance 7471 (emphasis added). Instead, the guidance calls for a functional analysis of whether a proposed plan continues a minority group's ability to elect. That approach encompasses not only consideration of population statistics but also consideration of "voting patterns

within the jurisdiction, voter registration and turnout information, and other similar information." *Ibid.* DOJ's position is longstanding. See *Texas* v. *United States*, 831 F. Supp. 2d 244, 265 n.26 (D.D.C. 2011) (noting consistency of DOJ guidance); see also *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001).[2] Because the district court's strict scrutiny analysis rested on an erroneous construction of Alabama's statutory obligations, it must be vacated.

B. This Case Should Be Remanded For An Appropriate Strict Scrutiny Analysis

1. This Court's precedents indicate that the appropriate course in light of the district court's error is to allow the district court to determine in the first instance, using a correct construction of the VRA, whether any predominant use of race in Alabama's districting was narrowly tailored to serve a compelling governmental interest. See *Shaw I*, 509 U.S. at 658 (remanding case for analysis of questions including whether consideration of race was justified based on

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[2] The Attorney General's decision not to interpose objections to Alabama's redistricting plans does not suggest that Alabama was correct in its understanding that maintenance of certain percentages of black voters in majority-black districts was required by Section 5. In reviewing plans under Section 5, DOJ's review is limited to whether a proposal results in retrogressive effect or reflects a discriminatory purpose prohibited by Section 5. Preclearance accordingly does not constitute a determination that changes in a districting plan were *necessary* to comply with Section 5. Nor does preclearance constitute "certification that the voting change satisfies any other requirement of the law beyond that of [S]ection 5," 28 C.F.R. 51.49, including other parts of the VRA or constitutional provisions. 2011 Guidance 7470.

the VRA without first deciding whether VRA compliance was compelling interest); see also *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997) (assuming but not deciding that VRA compliance was compelling interest); *Shaw II*, 517 U.S. at 915 (same).

Adherence to that approach is particularly appropriate here. Although the dissenting judge concluded that Alabama lacked a compelling interest in complying with Section 5 of the VRA in light of this Court's *Shelby County* decision, proceedings on remand may clarify that an appropriate disposition of this case will not require a resolution of that question. There will be no need to reach that question unless the district court on remand first concludes that race did predominate over traditional districting criteria in the drawing of any of the challenged districts. Even then, there will be no need to reach the question unless the district court concludes that the State had a strong basis in the evidence to believe that Section 5—properly construed—required the State to maintain the particular percentages of black voters it maintained in those districts. If the composition of the districts cannot be justified as narrowly tailored under a correct understanding of Section 5, then the districts will be invalid whether or not the State's reliance on Section 5 would have provided a compelling interest sufficient to justify appropriately drawn districts.

Indeed, the status of Section 5 for redistricting plans based on the 2010 census will only be relevant if the State would have lacked a strong basis in evidence to believe that Section 2 required the same result as Section 5. To establish a violation of Section 2, a plaintiff must show that a minority group "is sufficiently large and geographically compact to constitute

a majority in a single member district"; that the minority group is "politically cohesive"; and that the majority "votes sufficiently as a bloc to enable it * * * to defeat the minority's preferred candidate." *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986); see also *Growe* v. *Emison*, 507 U.S. 25, 40-41 (1993). If a plaintiff establishes these conditions, a court considers whether, under "the totality of the circumstances," members of the minority group have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." *Abrams*, 521 U.S. at 91 (quoting 42 U.S.C. 1973(b)). Because the districts alleged to have been racially gerrymandered in this case were all majority-minority districts and there was evidence of both minority group cohesiveness and racial bloc voting, there is a substantial chance that the obligations of Section 2 and Section 5 in Alabama's redistricting are coextensive. These circumstances counsel in favor of adherence to the Court's prior approach of reserving judgment concerning compliance with the VRA as a compelling interest.

2. a. If the Court elects to consider at this stage whether, at the time of Alabama's redistricting, strict scrutiny permitted the narrowly tailored consideration of race to comply with the VRA, the Court should answer in the affirmative. The strict scrutiny standard allows States to employ racial classifications that are narrowly tailored to achieve compelling interests. See, *e.g.*, *Shaw I*, 509 U.S. at 642. To meet this standard, a State must show that it had "a strong basis in evidence" to conclude that the use of race was necessary to serve a compelling interest. *Shaw II*, 517 U.S. at 908 n.4; *Shaw I*, 509 U.S. at 656; *LULAC*, 548 U.S.

at 519 (Scalia, J., concurring in the judgment in part and dissenting in part); see also *Ricci* v. *DeStefano*, 557 U.S. 557, 585 (2009) (applying strong-basis-in-evidence standard in Title VII context).

The "strong basis in evidence" standard gives States some margin of safety in determining whether the use of race is needed to comply with a statutory mandate or other compelling objective. While the "strong basis in evidence" requirement demands more than legislators' good-faith belief that the use of race is justified, see *Ricci*, 557 U.S. at 563, it does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid, see *id.* at 580-581; *Vera*, 517 U.S. at 977 (plurality opinion). Legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have good reasons to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance. See *Ricci*, 557 U.S. at 582-583 (contrasting standard requiring "a provable, actual violation" of statute in absence of racial classification with "strong basis in evidence" standard). Because constitutional and statutory duties "are not always harmonious," *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion), a more rigorous standard would "'trap[]" public officials "between the competing hazards of liability'" for failing to comply with a statute on the one hand, or violating the Constitution, on the other, *Vera*, 517 U.S. at 977 (plurality opinion) (citation omitted).

b. When Alabama enacted its 2012 redistricting statute, Alabama had a strong basis in evidence for its conclusion that it had a compelling interest in consid-

ering race to avoid a violation of the VRA. This Court has assumed that States have a compelling interest in avoiding a violation of Section 2. See, *e.g.*, *Abrams*, 521 U.S. at 91; *Shaw II*, 517 U.S. at 915; *Vera*, 517 U.S. at 978 (plurality opinion); see also *id.* at 990 (O'Connor, J. concurring). That assumption is unaffected by this Court's decision in *Shelby County*. And with respect to Section 5, in *LULAC*, eight Justices agreed that compliance with that provision was a compelling state interest, reflecting that if compliance with a statute that had been upheld as a valid exercise of federal power did not constitute a "compelling state interest[]" for constitutional purposes, States would be placed "in the impossible position of having to choose between compliance with [federal law] and compliance with the Equal Protection Clause." 548 U.S. at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, J.J.); see also *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.).

Appellants do not here dispute that compliance with Section 2 and Section 5 of the VRA could be a compelling state interest for Alabama, but the dissent below concluded that compliance with Section 5 of the VRA could not be because, after Alabama passed its redistricting plan in 2012, this Court held that the existing coverage formula in Section 4(b) of the VRA could not be used as a basis for making Section 5 mandatory for any State. See *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612 (2013).

This view misunderstands the nature of compelling interest analysis. As noted above, for Alabama to have been justified in complying with Section 5 in its redistricting, Alabama needed only a "strong basis in evidence" for the conclusion that doing so was required to serve the compelling interest of compliance with federal law. See *Ricci*, 557 U.S. at 582-583; cf. *Vera*, 517 U.S. at 977 (plurality opinion) ("If the state has a 'strong basis in evidence,' for concluding that creation of a majority-minority district is reasonably necessary to comply with" the VRA "and the districting that is based on race 'substantially addresses' the VRA violation, it satisfies strict scrutiny.") (citation omitted). This standard does not demand Alabama's compliance with Section 5 to have "in fact" been legally required. See *Ricci*, 557 U.S. at 580.

Alabama had the requisite "strong basis in evidence" to believe that Section 4 required it to comply with Section 5, notwithstanding this Court's later decision in *Shelby County*. Section 4—which made compliance with Section 5 mandatory for Alabama—was "presumed constitutional" as an Act of Congress. *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (citing *Fairbank* v. *United States*, 181 U.S. 283, 285 (1901)). Further, both Sections 4 and 5 had been repeatedly upheld by this Court. See, *e.g.*, *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328-333 (1966). And after the VRA was reauthorized by large majorities of both houses of Congress in 2006, all courts, until this Court's decision in *Shelby County*, again upheld the relevant provisions. See *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), aff'd, 679 F.3d 848 (D.C. Cir. 2012), rev'd, 133 S. Ct. 2612 (2013);

Northwest Austin Mun. Util. Dist. No. One v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (three-judge court), rev'd on other grounds, 557 U.S. 193 (2009). The presumption of constitutionality of federal statutes, and the long history of decisions upholding the relevant portions of the VRA, provided Alabama with a strong basis in evidence to conclude that compliance with Section 5 was required.

A contrary holding would place States in the impossible bind that this Court sought to avoid when it adopted the "strong basis in evidence" standard. States engaged in core sovereign functions would be required to strike precisely the balance that a court would ultimately strike years later in balancing "not always harmonious" constitutional and statutory mandates—with the certainty of a constitutional or statutory violation if they guessed wrong. See *Wygant*, 476 U.S. at 277 (plurality opinion). This Court has rejected the argument that strict scrutiny requires "the States 'to get things just right'" in this way. *Vera*, 517 U.S. at 978 (plurality opinion) (citation omitted). Rather, consistent with the "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan" this Court has explained that in implementing the strict-scrutiny standard, "deference is due to [States'] reasonable fears of, and to their reasonable efforts to avoid, [Section] 2 liability." *Ibid.*

A requirement that States "get things just right" in balancing statutory and constitutional obligations would be particularly problematic in the districting context, because redistricting is a core state function. See, *e.g.*, *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975). Because "[f]ederal-court review of districting legisla-

tion represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915, see also, *e.g.*, *LULAC*, 548 U.S. at 414-415 (plurality opinion); *Abrams*, 521 U.S. at 101, it is appropriate that constitutional standards give States some leeway to reasonably reconcile constitutional and statutory mandates, see *McDaniel* v. *Sanchez*, 452 U.S. 130, 138-139 (1981) (explaining greater flexibility accorded to legislatures than courts in implementing guarantee of "one-person, one-vote").

In addition, strong reliance interests are at stake. This Court has recognized that in determining when redistricting is required, the interests protected by the Equal Protection Clause must be balanced against citizens' interests in political stability. Thus, while the Equal Protection Clause requires that legislative districts be equally apportioned, States are not required to draw such districts more than once per census period, *Sims*, 377 U.S. at 577, because of the "need for stability and continuity in the organization of the legislative system," *id.* at 583; see also *LULAC*, 548 U.S. at 421 (opinion of Kennedy, J.) (describing legal fiction that plans are constitutionally apportioned through the decade as "a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability"). The same balancing counsels against requiring mid-decade redistricting changes based on the change in the law brought about by *Shelby County*. Such a requirement would undermine the "stability and continuity" of state governance in the 16 States that adopted districting plans in compliance with Section 5 following the 2010 census, see *Status of Statewide Redistricting Plans*, http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last

visited Aug. 14, 2014), in addition to the thousands of covered local jurisdictions.

3. To satisfy strict scrutiny, any use of race as a predominant consideration in drawing the boundaries of legislative districts must be narrowly tailored. See, *e.g.*, *Vera*, 517 U.S. at 977 (plurality opinion); *Miller*, 515 U.S. at 920. Use of race is narrowly tailored to achieve compliance with the VRA if it "substantially addresses" a reasonably perceived statutory violation, *Vera*, 517 U.S. at 977 (plurality opinion) (quoting *Shaw II*, 517 U.S. at 918), and does not "subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid" the violation, *id.* at 979.

This case should be remanded for application of the narrow tailoring standard, because application of the standard here requires the resolution of factual questions that the district court did not decide. Most notably, because Section 2 and Section 5 constrain only electoral practices that deny or abridge the ability of minority voters to elect their candidates of choice, a narrow tailoring analysis requires resolving disputed questions concerning the population levels needed to preserve black voters' ability to elect candidates of choice. See J.S. App. 106-107, 164-165 (describing conflicting evidence regarding necessary population levels in Alabama before the district court). At least some of Alabama's majority-black districts were sustained at a higher population level than appears to be supported by the ability-to-elect evidence presented below. See J.S. App. 47-48 (noting districts with black populations in excess of 70 percent). Nonetheless, it is appropriate for the district court to determine in the first instance whether the use of race as a predomi-

nant consideration in drawing any particular district's lines was a narrowly tailored means of complying with the VRA.

CONCLUSION

The district court's decision should be vacated, and this case should be remanded for further consideration.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, *ET AL.*,
Appellants,

v.

ALABAMA, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of the petitioners.[1] ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. Today, it is one of the world's leading civil and human rights organizations, and its history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority or the majority.

ADL believes that the U.S. Constitution requires each person in our nation to receive equal treatment under the law, and that each person has the right to be treated as an individual, rather than as part of a racial, ethnic, religious, or gender-defined group. Consistent with its core mission — "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against... any sect or body of citizens" — ADL has filed numerous briefs *amicus curiae* in this Court in cases arising under the Equal Protection Clause of the Fourteenth Amendment

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

to the Constitution and the Nation's civil rights laws.[2] ANTI-DEFAMATION LEAGUE 1913 CHARTER (1913).

ADL's staunch commitment to diversity has not diminished its belief in the precept that the Equal Protection Clause obligates government to refrain from racial discrimination in all forms. For this reason, ADL has *opposed* virtually all of the racial classifications that have been challenged in this Court, including racial preferences and quotas. *See supra* note 2. Indeed, ADL has long maintained that when government uses race as a decisive factor in allocating opportunities or benefits it ignores merit and

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[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Cardona v. Power*, 384 U.S. 672 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013); and *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

improperly classifies citizens on the basis of immutable characteristics that are, or should be, irrelevant in a free and democratic society.

In the specific context of redistricting efforts, ADL has filed numerous briefs *amicus curiae* before this Court opposing race-based redistricting. For example, in a brief submitted as *amicus curiae* in *Johnson v. De Grandy*, ADL argued that "the Voting Rights Act was not intended to relegate racial, ethnic and language minorities to permanent minority status, which is the inevitable result of a fixation on race-based numerical goals."[3] Similarly, in *Miller v. Johnson,* ADL "strongly reaffirm[ed] its principled adherence to a policy opposing racial classifications of all kinds," arguing that "when race is the substantial or motivating factor in redistricting, strict scrutiny is compelled under the Equal Protection Clause."[4]

SUMMARY OF THE ARGUMENT

In the context presented here, ADL agrees with Appellants that Alabama engaged in race-based redistricting, which triggers a strict scrutiny analysis to pass constitutional muster. Alabama's post-2010 census redistricting plan must fail this rigorous standard. Although compliance with the Voting Rights Act ("VRA") can constitute a compelling state interest, Respondents fundamentally misunderstood the VRA's requirements. As a result, the State failed to narrowly

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[3] Brief for Anti-Defamation League as Amicus Curiae Supporting Neither Party, *Johnson v. De Grandy*, 512 U.S. 997 (1994).

[4] Brief for Anti-Defamation League as Amicus Curiae Supporting Appellees, *Miller v. Johnson*, 515 U.S. 900 (1995).

tailor its redistricting plan and created a redistricting plan that unconstitutionally subordinates traditional race-neutral redistricting principles to race-based considerations.

The substantive issue before this Court is whether the non-retrogression portion of Section Five of the VRA justifies Alabama's redistricting plan such that it could pass constitutional muster. Yet, Respondents ask the Court to address the constitutionality of Section Two of the VRA. Judicial restraint dictates that this Court should issue a narrow ruling and refrain from addressing any questions about the constitutionality of Section Two of the VRA. Furthermore, the context of this case effectively raises no issue under Section Two. Therefore, this case presents a poor vehicle to address the constitutionality of that provision.

ARGUMENT

I. Alabama Engaged in Race-Based Redistricting That Subordinated Traditional Race-Neutral Districting Principles to Race-Based Considerations

The evidence is overwhelming that the Alabama officials who created the redistricting plan approved by the Alabama legislature designed districts for the Alabama House of Representatives and Senate based on the racial makeup of such districts. While a state may undoubtedly consider race as one factor among many in drawing district lines, a state engages in unconstitutional race-based redistricting when "the legislature subordinate[s] traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political

subdivisions or communities defined by actual shared interests, to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916, 928-29 (1995); *see also Shaw v. Reno*, 509 U.S. 630, 646 (1993).

In this case, the plan drafters' primary, if not exclusive, concern was in maintaining the percentage of black voters in majority-minority districts drawn in the prior redistricting scheme. Citing the non-retrogression requirements of Section Five of the VRA as their motivating factor, the drafters labored under the profound misunderstanding that Section Five required that Alabama design the districts so as to attain what the dissent below correctly termed "naked 'racial quotas.'" *Ala. Legislative Black Caucus v. Alabama*, 989 F Supp. 2d 1227, 1313 (M.D. Ala. 2013) (Thompson, J., dissenting) (citing *Bush v. Vera*, 517 U.S. 952, 976 (1996)). In so doing, the State engaged in unconstitutional race-based re-districting that subordinated traditional race-neutral re-districting principles to race-based considerations.

The drafters of the Alabama re-districting plan freely admit that their primary goal in drawing the district lines was race-based. The three principle actors who designed the redistricting plan in question—Senator Gerald Dial and Representative Jim McClendon, co-chairs of the Joint House-Senate Permanent Legislative Committee on Reapportionment, and Randy Hinaman, the political consultant they hired—all testified at trial that their understanding of the non-retrogression requirement of the VRA mandated that the redistricting plan retain the same percentage of black residents in majority-minority districts as those districts had when the 2010

Census data was applied to the district boundaries established by redistricting in 2001. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1314. At trial, for example, Senator Dial agreed that his understanding of the non-retrogression principles required the drafters to "maintain the black majority percentage." *Id.* at 1314. Representative McClendon testified that they "tr[ied] not to change the percentages of the citizens, the black citizens." *Id.* Similarly, Hinaman testified that his first priority in drawing the districts was "not regressing minority districts," which he understood to mean looking at the "2010 census as applied to the 2001 lines" and "tr[ying] to be as close to that as possible." *Id.* at 1323.

The following exchange during the deposition of Senator Dial is particularly illustrative:

> Q. So you did not want the total population of African-Americans to drop in [SD 23]?
>
> A. That's correct.
>
> Q. Okay. And if that population dropped a percentage, in your opinion that would have been retrogression?
>
> A. Yes, sir.
>
> Q. So if -- And I'm not saying these are the numbers, but I'm just saying if Senator Sanders' district had been 65 percent African-American, if it dropped to 62 percent African-American in total population, then that would have been retrogression to you?
>
> A. In my opinion, yes.

> Q. And so that's what you were trying to prevent?
>
> A. Yes.

Id. at 1324.

Beyond the drafters' testimony regarding their intent, the results of the redistricting plan standing alone clearly show that the State subordinated traditional race-neutral districting principles, such as creating compact districts, preventing conflicts between incumbents, and avoiding splitting precincts, to racial considerations. For example, in the plan's redrawn House Districts 53 and 73, incumbents Demetrius Newton and Joe Newton were each left living in the other's district. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1258. Perhaps more importantly, the plan split numerous precincts, which should have remained intact under traditional race-neutral districting principles. Indeed, the districting plan split approximately 25 percent of all precincts statewide. *Id.* at 1318. Hinaman testified that, in attempting to avoid his understanding of retrogression, he would first look for majority-minority precincts to add to majority-minority districts in need of more black residents to fulfill the quotas that he set. *Id.* at 1319. When adding whole precincts would decrease the number of black voters in the district, however, Hinaman testified that he would split precincts to achieve racial quotas. *Id.*

Race is the only factor that can explain the pervasive precinct-splitting in which the State engaged. In deciding how to draw the district maps Hinaman had access to maps illustrating the racial composition of units smaller than precincts, but not

information about political affiliation, for example, of residents in units smaller than precincts. *Id.* at 1319. The district splits, therefore, cannot be tied to political affiliation or other race-neutral considerations. Rather, they evince clear evidence of the subordination of traditional race-neutral considerations in redistricting to race-based considerations.

While it is undeniably true that the drafters of the redistricting plan simultaneously focused on compliance with a new requirement to draw the district lines within one percentage point of the ideal district size, that fact alone does not show race was not a primary concern in drawing the district lines. To the contrary, the new requirements meant that the drafters focused even more carefully on drawing racially-motivated lines. Before the latest redistricting scheme, the Alabama legislature adopted a new policy that required the population of each district not deviate from the ideal size by more than one percent. The prior Alabama redistricting rules permitted deviation of population in each district of up to five percent. Under the prior regulations, greater flexibility in the population of each district had given the drafters of the district lines a greater ability to design new districts that did not rely on racial quotas.

Many of the majority-minority districts before the latest redistricting scheme had fallen within the lower end of the five percent requirement. That is, they were under-populated by the new one percent requirement. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1235. By adopting the one percent rule, the Alabama legislature created a situation in which compliance with the new rule required a larger number of black

residents to be moved into the majority-black districts under the new rule compared to the previously implemented five percent deviation model. The Alabama legislature therefore created an environment whereby the new districts required massive reorganization, elimination, combination, and splitting of districts to avoid what the drafters misunderstood to be the non-retrogression requirements of Section Five of the VRA.

The combination of the requirement that more black residents had to be moved into most of the majority-minority districts to address the ideal size requirement, with the erroneous belief that each majority black district had to match the percentage of black population from the 2000 redistricting results, led to unconstitutional race-based redistricting. The drafters' erroneous belief that any reduction in percentage of black population in majority-black districts constitutes retrogression that is not permitted by Section Five of the VRA required packing of thousands of black voters into districts wherein blacks already had a controlling interest. The belief that a specific percentage of blacks was required for each district, sometimes at rates in excess of 75%, is not only unconstitutional race-based redistricting, but it also undoubtedly constitutes a racial quota. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (holding that "quotas impose a fixed number or percentage which must be attained") (internal quotation marks omitted).

II. Alabama's Redistricting Plan Fails Strict Scrutiny Because, in Misunderstanding the Requirements of the VRA, the Drafters Failed to Narrowly Tailor the Plan to a Compelling State Interest

A. Redistricting That Subordinates Traditional Race-neutral Redistricting Principles to Race-based Considerations Requires Strict Scrutiny

This Court has repeatedly held that rigid racial quotas, such as the ones in question in this case, should be met with skepticism, and that quotas strike at the heart of the Fourteenth Amendment's guarantee of equal protection. The Constitution's Equal Protection Clause mandates that citizens will be treated as individuals "not as simply components of a racial, religious, sexual, or national class." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (quoting *Miller*, 515 U.S. at 911) (internal citation omitted).

This Court has consistently held that the primary focus of the Fourteenth Amendment "is to prevent the States from purposefully discriminating between individuals on the basis of race." *See, e.g., Shaw*, 509 U.S. at 642. The central mandate of the Equal Protection Clause of the Fourteenth Amendment is "race neutrality in government decisionmaking." *Miller*, 515 U.S. at 904; *See also Loving v. Virginia.*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-192 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Although the facts of particular cases may render analysis complicated, "the basic principle is straightforward: 'Racial and ethnic distinctions of any

sort are inherently suspect and thus call for the most exacting judicial examination.'" *Miller*, 515 U.S. at 904 (citing *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 291 (1978)). As such, "laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." *Miller*, 515 U.S. at 904.

In the particular context of redistricting, a scheme that is "'unexplainable on grounds other than race,' . . . demands the same close scrutiny that we give other state laws that classify citizens by race." *Id.* at 905 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Pursuant to this Court's holding in *Shaw*, state-drawn districts formed so as to distinguish explicitly between individuals on racial grounds are subject to strict scrutiny. *See Miller*, 515 U.S. at 910. This Court has held that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Shaw*, 509 U.S. at 645. As explained above, Alabama undoubtedly engaged in race-based redistricting that subordinated traditional race-neutral districting principles to race-based considerations. Alabama's redistricting scheme is therefore subject to strict scrutiny.

B. Alabama's Redistricting Plan Fails Strict Scrutiny Because it Is Not Narrowly Tailored to Comply with the Requirements of the VRA

Alabama's use of racial quotas to establish districts for election of state legislators can survive review only if such use is narrowly tailored to achieve a compelling

government interest. *Miller*, 515 U.S. at 904. While compliance with the VRA is a compelling state interest, such compliance must be based on a correct understanding of the Act. *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"); *see also Miller*, 515 U.S. at 921 (a district must be "required by the substantive provisions of the Act").

Section Five of the VRA has never given "covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression." *Shaw*, 509 U.S. at 655. The drafters of Alabama's redistricting plan fundamentally misunderstood Section Five of the VRA. The VRA does not require that the percentage of black residents in the new districts stay exactly at or above the percentages after the previous redistricting efforts after the 2000 Census. Accordingly, the State failed to narrowly tailor the redistricting plan to a compelling state interest.

Section Five of the VRA, properly read, prevents actions that would reduce minority voters' effective ability to elect candidates of choice and does not require matching of pre-existing levels of minority population. As this Court has found, "[T]he purpose of [§] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. U.S.*, 425 U.S. 130, 141 (1976). The watchword used by Congress in amending the VRA in 2006 is that the "ability to elect" representatives of choice by minorities is to be protected. The VRA in no way justifies a slavish adherence to a particular percentage point quota, as Alabama erroneously

claims. In misreading and misunderstanding the nonretrogression requirements of Section Five, the State's resulting redistricting plan necessarily fails strict scrutiny because, as this Court has found, "a reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw*, 509 U.S. at 655. As this Court has held, "it takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Miller*, 515 U.S. at 927-28.

Alabama cannot hide behind the argument that the Department of Justice (DOJ) precleared the plan. This Court long ago rejected "the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Miller*, 515 U.S. at 922. A redistricting plan that is merely permissible under the VRA does not satisfy the strict scrutiny standard. *See Id.* at 921-922. Rather, the standard mandates that the parameters of the districting plan must actually be required by the VRA. *Id.* at 921. The majority below, however, erroneously based its decision on the contrary contention; that the State having obtained preclearance has proved that its understanding of Section Five is correct. This view erroneously ignores that the burden of proof rests with the State to establish that its actions were required by a correct reading of the VRA. It is not the plaintiff's burden to show that Alabama's understanding of the requirements of the statute are demonstrably incorrect. *Id.* at 920 ("Strict scrutiny is a searching examination,

and it is the government that bears the burden ..."). "Where a State relies on the Department's determination that race-based districting is necessary to comply with the Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.* at 922.

In this case, DOJ's preclearance of the redistricting plan has even less bearing on the constitutionality of the scheme because DOJ did not have the authority to deny preclearance based on the constitutional questions at issue. By statute, DOJ may only ensure that a plan does not have a retrogressive effect or "any discriminatory purpose." 42 U.S.C. § 1973c(b)-(d). DOJ guidance specifically states that "the Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle, [or] on the grounds that it violates *Shaw v. Reno*, 509 U.S. 630 (1993)." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011). Thus, DOJ was proscribed from considering the constitutional questions at issue in this case, making its preclearance of Alabama's districting plan irrelevant.

III. This Case Does Not Squarely Present a Question Regarding the Constitutionality of Section Two of the Voting Rights Act and Would Be an Exceptionally Poor Vehicle to Analyze its Constitutionality

This Court is limited to reviewing the questions that have been presented by the parties and raised by the issues below. In issuing decisions "the 'cardinal

principle of judicial restraint' is that 'if it is not necessary to decide more, it is necessary not to decide more.'" *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) (quoting *PDK Labs, Inc. v. U.S. Drug Enforcement Admin.*, 632 F.3d 786, 799 (C.A.D.C. 2004)(Roberts, J. concurring in part and concurring in judgment)).

In relevant part, the substantive issue before this Court is whether the non-retrogression portion of Section Five of the VRA justifies Alabama's redistricting plan such that it could pass constitutional muster. In Appellees' Joint Motion to Dismiss or Affirm, however, the State argues that "Section Two of the Voting Rights Act requires the state to create and maintain districts that allow compact racial minorities to elect candidates of their choice," and that "black legislators and political leaders suggested to the drafters and testified at trial that, to comply with Section Two, the black population of the majority-black district must usually be more than 60 percent and sometimes more than 65 percent." Appellees' Joint Motion to Dismiss or Affirm, 21. As argued above, it is clear from the record below that the drafters' primary, if not only, putative reason for drawing the districts as they did was compliance with their understanding of the non-retrogression requirements of Section Five of the VRA. As such, this Court should issue a narrow ruling addressing whether Alabama's redistricting scheme was narrowly tailored to fit the requirements of Section Five of the VRA. Furthermore, the context of this case effectively raises no constitutional issue under Section Two of the VRA. Therefore, this case would present an exceptionally poor vehicle to assess the constitutionality of that provision.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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August 2014

AMICUS CURIAE BRIEF

13-895, 13-1138

IN THE

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,

Appellants,

—v.—

ALABAMA, *et al.*,

Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,

Appellants,

—v.—

ALABAMA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice at NYU School of Law is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality, including by, among other things, working to preserve and protect the right to vote for every eligible citizen.

The consolidated cases before the Court pose important questions about the Equal Protection Clause, the Voting Rights Act, and use of race in redistricting. In the hope that it will be of assistance in analyzing the complex issues before the Court, the Brennan Center respectfully submits brief amicus curiae.

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[1] The appellants and appellees have filed blanket letters of consent to amicus briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to the preparation or the submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF ARGUMENT

Alabama violated constitutional principles because it established a strict racial quota when drawing district lines without first undertaking any factual inquiry as to community or remedial needs.

While *Shaw v. Reno*, 509 U.S. 630 (1993), and the racial gerrymandering line of cases ordinarily require that courts engage in a complicated analysis to determine whether race was the primary consideration in a redistricting effort, that step is not necessary here because Alabama concedes that its overriding goal, as it equalized the population of districts across the state, was to make sure it maintained the same percentage of African Americans in each majority-minority district that previously existed. The only question then is whether those racial quotas were permissible to enable Alabama to meet an appropriate governmental interest. They were not.

Alabama's constitutional error was not its use of racial population targets in the redistricting process but rather its adoption of mechanistic racial population quotas without first undertaking an appropriate analysis to determine that those numbers were, in fact, related to permissible goals, like complying with the Voting Rights Act or adhering to traditional redistricting principles. Alabama claims that it was motivated by the need to comply with Section 5 of the Voting Rights Act. But instead of undertaking a particularized factual analysis, based on current circumstances, to determine what district lines and population targets were in fact needed to ensure that its plan did not

result in "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 130, 141 (1976), as contemplated by Section 5, Alabama used racial population quotas as both the starting and ending point of its inquiry. This Court has long treated superficial racial quotas with skepticism in the affirmative-action context, and the same concerns apply here. Without a factual analysis, it is impossible to determine whether the state's use of race served the remedial and prophylactic goals of the Voting Rights Act or masked more invidious goals. A mechanistic quota, simply put, is not the sort of tool the Constitution permits states to use to ensure compliance with Section 5.

Moreover, Alabama fundamentally misconstrued and perverted the mandates of Section 5. Both the courts and the Department of Justice have long rejected mechanistic racial population quotas under Section 5 in favor of a more nuanced and multi-factor factual inquiry. Rather than advancing the goals of Section 5, mechanical quotas threaten to undermine them by enabling "packing" of minority voters and other techniques to undermine their ability to elect the representatives of their choice and failing to take into account changes in facts and circumstances. This Court's Section 2 jurisprudence, while not directly at issue in this case, supports the need for a nuanced factual inquiry when applying race-based remedies in the redistricting context.

Because Alabama did not engage in such a nuanced factual inquiry before applying its racial population quotas, its redistricting plan is constitutionally tainted and should be voided. Requiring Alabama to redraw its districts using a correct interpretation of Section 5 will serve not only the mandates of the Equal Protection Clause, but will advance and ensure accountability on sensitive issues at the intersection of race and politics that deserve the legislature's accurate and unfettered consideration and judgment.

ARGUMENT

I. Alabama's Racial Quotas, Adopted Without Any Factual Analysis, Are Constitutionally Suspect

Alabama's 2011 redistricting plans were born of a flawed premise: That the state's "new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census" in order to avoid "retrogression" under Section 5 of the Voting Rights Act. *Alabama Legislative Black Caucus, et al., v. Alabama, et al.*, 989 F. Supp. 2d 1227, 1247 (M.D. Ala. 2013). This poorly constructed rule, adopted without any research or investigation (factual or legal)[2] into whether the numerical racial population numbers reflected current needs or realities, badly misconstrues the state's responsibilities under Section 5.

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[2] *See* Brief of Appellants Alabama Democratic Caucus ("ADC Br."), et al., *Alabama Democratic Caucus, et al., v. Alabama, et al.*, No. 13-113 (August, 13, 2014), at 5-12.

Instead of assessing the actual ability of African-American voters to elect representatives of their choice or considering other redistricting criteria or indicia of community, Alabama legislators required mapdrawers to use predetermined racial population quotas. In doing so, they forced the mapdrawers to take extraordinary steps, over the objections of minority lawmakers, to meet those goals. This kind of unthinking racial quota, divorced from any analysis as to remedial or prophylactic needs, is constitutionally suspect under any standard of review. *See Romer v. Evans*, 517 U.S. 618, 635 (1996) ("A status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests . . . is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.").

The problem in this case is not that Alabama considered race when it undertook its 2011 redistricting or that it drew majority-minority districts or even that race was a significant consideration guiding the shape that districts took. None of those things would have taken Alabama's maps beyond the constitutional pale if they were done to recognize natural communities or to remedy or prevent discrimination. In fact, it would be strange for a mapdrawer to fail to take into account the existence of racial and ethnic communities, especially where the daily experience of minority groups continues – progress notwithstanding – to be heavily impacted by race.[3] Those communities are

[3] In places like New York City, for example, it is not hard to find issues like de facto school segregation, stop-and-frisk policies,

real, and the redistricting process rightly takes them into account.

But this Court has cautioned it is possible to go too far in defining district lines by race. *See Miller v. Johnson,* 515 U.S. 900, 919 (1995) (finding that the "evidence was compelling 'that there are no tangible "communities of interest"' spanning the hundreds of miles" between distinct African-American communities that had been forced together). Minorities in a rural part of a state might have very different experiences, needs, and worldviews than members of the same minority group who live in heavily urbanized areas.

When a jurisdiction, like Alabama, adopts racial population targets without any investigation to make sure that the numeric goals actually reflect current realities and are actually tailored to serve an appropriate government interest, such as remedying or preventing discrimination, it offends the Constitution for at least three reasons. First, the jurisdiction engages in a naked form of racial stereotyping. Second, it risks failing to take into account the evolution of society, including changing voting patterns, communities, and polarization levels. Third, it risks compelling the packing of minorities into supermajority districts when such districts are no longer necessary to ensure fair representation and when such districts might even

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and instances of alleged excessive force by police that mean that members of distinct ethnic groups often have a strong sense of shared community forged along racial and ethnic lines. The same is true in other parts of the country.

undermine the interests of the communities they purport to benefit.

It is for similar reasons that this Court has consistently regarded racial quotas with deep suspicion. More than 35 years ago, for example, in *Bakke*, this Court held unconstitutional a medical school admissions policy that set aside a certain number of slots for members of minority groups, likening the numerical set-aside to a "prefer[ence] for members of one group 'for no other reason than race or ethnic origin.'" *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978). More recently, the Court struck down an affirmative-action program at the University of Michigan that automatically awarded points to applicants from certain minority groups. *Gratz v. Bollinger*, 539 U.S. 244 (2003). Although all prospective Michigan students also could receive points for other non-race based criteria, the Court found the Michigan program "problematic" because, as far as the race-related points were concerned, "[t]he only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups." *Id.* at 271-72.

While the Court's affirmative-action cases take place in a different context, their basic teaching that bare racial quotas are constitutionally suspect and thus need to be justified is applicable here. To overcome constitutional doubts about such racial classifications, it is not enough for the state to invoke a permissible governmental object. The state must also show that it engaged in a careful, deliberative

process to ensure that its race-based decision was actually calibrated serve its legitimate interest. *Romer v. Evans*, 517 U.S. at 635 (classification must bear a factual connection to the legitimate interest it purports to serve). Here, there is no question that Alabama engaged in no factual analysis whatsoever to determine whether its racial classification bore a factual connection to its interest in complying with the Voting Rights Act.

A requirement that the state engage in some sort of factual analysis before applying racial population targets is necessary to ensure that that those targets are in fact designed to achieve their stated purpose and not an invidious purpose. As the Court explained in *Shaw*, a "reapportionment plan would not be . . . tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw*, 509 U.S. at 655. There is no question, for example, that legislatures rightly would be barred by the Fourteenth Amendment from adopting a 99% population quota for African-American districts, though such districts conceivably might not result in retrogression.[4]

Although Alabama did not adopt a 99% quota, what it did is similarly troubling. It drew district lines without regard to the concerns of (and, in some cases, with opposition from) the very people it was purporting to protect and without any consideration

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[4] Although it is conceivable that a 99% African-American district could pass muster under Section 5, such a district almost certainly would raise significant questions about packing and discriminatory purpose.

of whether the districts it drew would serve the interests of the Voting Rights Act. J.A. at 93. Absent an appropriate analysis that takes into account current facts on the ground, its racial population targets are simply unjustified racial quotas.

II. Alabama's Racial Quotas Cannot be Justified by the State's Interest in Complying With Section 5 of The Voting Rights Act

Alabama cannot overcome the constitutional suspicions that attach to its quotas by asserting that it only did what it did because it needed to obtain approval for its redistricting plans under Section 5 of the Voting Rights Act. J.A. at 29-31, 96-96.

To be sure, compliance with the Voting Rights Act has long been treated by courts as a compelling interest. *Shaw v. Reno*, 509 U.S. at 654 ("States certainly have a very strong interest in complying with federal antidiscrimination laws."). However, that does not mean covered jurisdictions have free rein to adopt superficial racial quotas unconnected with the facts on the ground and without regard for what Section 5 actually requires.

A. *The Justice Department and Courts Have Rejected Alabama's Approach*

Not surprisingly, both courts and the Department of Justice have rejected Alabama's cramped interpretation of Section 5. As explained in guidance to Section 5 compliance issued by the Justice Department in February 2011:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a *functional analysis* of electoral behavior within the particular jurisdiction or election district.

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Dep't. of Justice Feb. 9, 2011) (emphasis added).

This position is not a new one. As the court in recent litigation over Texas's newest maps explained, the Department's 2011 guidance is "consistent with the guidance DOJ has been issuing to assess retrogressive effect for the past two decades." *Texas v. United States*, 831 F. Supp. 2d 244, 265 & n.26 (D.D.C. 2011) (three-judge court), *vacated on other grounds*, 133 S. Ct. 2885 (2013). Indeed, in the Justice Department's 1987 guidance on application of Section 5, the Department noted that many covered jurisdictions had urged it to adopt a retrogression standard that could be "applied to submitted changes in a fairly mechanical way." *Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 52 Fed. Reg. 486-501 (Dep't. of Justice Jan. 6, 1987). But the Department declined to do so because a "Section 5 determination [that] is . . . based on the appraisal of a complex set of facts [does] not readily fit a precise formula for resolving the

preclearance issues." *Id.*; *see also Hearing Before the House and Senate Special Interim Comms. On Redistricting*, 76th Leg., Tape 2, p. 15 (Feb. 16, 2000) (statement of Gaye Tenoso) (cautioning the Texas Legislature "against using magic numbers, 65 percent say" to gauge whether a majority-minority district was effective).

This Court, likewise, has acknowledged the complexity of the retrogression analysis required by Section 5 and eschewed predetermined numeric population benchmarks. *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 428 (2006) (observing that "it may be possible for a citizen-age majority to lack real electoral opportunity" despite its numeric majority); *see also Georgia v. Ashcroft*, 539 U.S. 461, 498 (2003) (Souter, J., dissenting) (agreeing with the majority that "the simple fact of a decrease in black voting age population . . . in some districts is not alone dispositive about whether a proposed plan is retrogressive"). As the District Court for the District of Columbia explained, "[t]he legal standard [under Section 5] is not total population, voting age population, voting age citizen population or registration, but the ability to elect. The Supreme Court repeatedly has declined to elevate any of these factual measures to a magic parameter." *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 79 (D.D.C. 2002) (three-judge court), *vacated on other grounds*, 539 U.S. 461 (2003) (citing *Johnson v. De Gandy*, 512 U.S. 997, 1017 n.14) (1994).

More recently, federal courts in both Texas and Florida have rejected mechanical racial population quotas in the redistricting context. In

Texas, the three-judge court considering requests to preclear Texas's legislative and congressional maps firmly declined to adopt the bright-line test proposed by Texas, holding:

> [P]opulation demographics alone will not fully reveal whether minority citizens' ability to elect is or will be present in a voting district. Demographics alone cannot identify all districts where the effective exercise of the electoral franchise by minority citizens is present or may be diminished under a proposed plan within the meaning of Section 5.

Texas v. United States, 831 F. Supp. 2d at 262 (citing *LULAC v. Perry*, 548 U.S. at 428). The Florida Supreme Court construing analogous non-retrogression provisions in the Florida state constitution, likewise, concluded:

> Because a minority group's ability to elect a candidate of choice depends upon more than just population figures, we reject any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number under Florida's minority protection provision. . . . To hold otherwise would run the risk of permitting the Legislature to engage in racial gerrymandering to avoid diminishment.

In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So.3d 597, 626-27 (Fla. 2012).

Consistent with this long understanding and practice, the Justice Department has precleared many plans in which the percentages of minorities in districts fell. *See* ADC Br. at 28-31. In the case before the Court, the district court majority below was simply wrong when it concluded that Alabama "chose the only option available" when it decided, without investigation, to keep the population of African-American districts at historic levels. J.A. at 181.

B. *Alabama's Racial Quotas Have Real Potential to Be Inconsistent With the Underlying Goals of Section 5*

In adopting its broad-brush racial quota untethered to any fact findings, Alabama turned a blind eye to at least three very real potential harms for minority communities and society at large.

1. Undermining Minority Political Gains

First, Alabama's superficial interpretation of Section 5 would permit states to use the guise of Voting Rights Act compliance to keep the populations of majority-minority districts fixed even as society continues to evolve. Thus, as population shifts, a jurisdiction that healed long-standing divisions and overcame discrimination might be required to draw increasingly awkward districts based unnecessarily on race.

The potential injury to minority communities is very real and goes beyond mere electoral outcomes. Where minority communities have been able to overcome or ameliorate the effects of discrimination to have their voices heard and their needs addressed, it would be remarkable to interpret Section 5 to mechanically require those gains to be undone simply to advance a quota.

Although it arises in a different context, the experience of Maverick County, Texas in the recent round of Texas redistricting illustrates how easily hard fought progress can be jeopardized. Maverick County is an isolated, overwhelmingly Hispanic county, located along the Texas-Mexico border, and "is among 'the poorest counties in the United States.'" *Texas v. United States,* 887 F. Supp. 2d 133, 209 (D.D.C. 2012) (appendix). Nonetheless, "despite their relative poverty, the citizens of Maverick County [had become] educated about the electoral process" and, through organization and a united front in voting, had found electoral dignity and "finally seen some . . . change come about." *Id.* at 209-210 (quoting trial testimony of Maverick County Judge David Saucedo). However, when it came time to draw congressional districts, Texas split the small county between two sprawling districts, making it harder for the county's Hispanic community to organize effectively to fight for things like four-year universities and veterans clinics. *Id.*

By mechanically prioritizing fulfilling the quota over all else, Alabama's quotas risk compelling similar stark results under the guise of enforcing the

Voting Rights Act. That would both fail to recognize progress and might undermine it.

2. Risk of a False Retrogression Choice

Redistricting quotas also create a tension between majority-minority districts and "ability to elect" districts that are independently protected under Section 5 even if they are not majority-minority districts.

Although much of the argument in this case centers on Alabama's treatment of the state's majority African-American districts, it is important to bear in mind that Section 5 is not limited to majority-minority districts. Rather, a district, even if it has a minority citizen voting-age population of less than 50%, may be protected by Section 5 from retrogression if minorities in the district have proven the "ability to elect" candidates of their choice. In many places in the country, courts have found that African Americans have the ability to elect when they constitute as little as 38.37% of the population. *Pender Cnty. v. Bartlett*, 649 S.E. 2d 364, 367 (N.C. 2007) ("Past election results in North Carolina demonstrate that a legislative voting district with a total African–American population of at least 41.54 percent, or an African–American voting age population of at least 38.37 percent, creates an opportunity to elect African–American candidates."); *see also Texas v. United States*, 831 F. Supp. 2d at 263 & n.24 (noting that even Texas's proposed bright-line "ability to elect" standard assumed African Americans in that state have the ability to elect when they make up 40% of a district's citizen voting age population).

The mechanical quotas advocated by Alabama risk creating a false choice between preserving such less than 50% ability to elect districts and cannibalizing their minority population to make sure majority-minority districts have a demographic supermajority, whether needed or not. In other words, Alabama's quota approach absurdly forces legislatures into having to consider retrogression in order to meet the quota. It would be hard to find a situation more at odds with the very purpose of Section 5.

Alabama's approach, in fact, may invite calculated efforts by legislators to short circuit the healthy and natural emergence of such minority influence just as it starts to become a reality. That is precisely what parties challenging South Carolina's 2011 legislative maps contend happened in that state. As one African-American state representative in South Carolina recounted in sworn testimony:

> As the conversation turned to redistricting, Rep. Viers told me that race was a very important part of the Republican redistricting strategy. Rep. Viers said that Republicans were going to get rid of white Democrats by eliminating districts where white and black voters vote together to elect a Democrat. He said the long-term goal was a future where a voter who sees a 'D' by a candidate's name knows that the candidate is an African-American candidate. . . . Then he chuckled and said, 'Well now, South Carolina will

> soon be black and white. Isn't that brilliant?'

Affidavit of the Honorable Mia Butler Garrick para. 16, *Backus v. South Carolina,* Case No. 3:11-cv-03120 (D.S.C. Feb. 22, 2012) (Doc. 147). It is hard to imagine more demeaning treatment of a community.

3. Creation of Non-Performing Districts

With existing Section 5 ability to elect districts, Alabama's approach also opens the door to a third, opposite danger – namely that districts created using quotas might underperform and no longer allow minorities to elect their community's candidates of choice, even if on paper the district's demographics look the same (or better). This is because election results are influenced by many things other than racial demographics. While districts might appear from a superficial demographic perspective as if they would allow minorities to elect candidates of their choice, a host of issues, including "minority voter registration and minority voter turnout," could impact the real-world likelihood that redrawn districts actually preserve minority electoral gains. *Texas v. United States*, 831 F. Supp. 2d at 264. For that very reason, the three-judge panel considering preclearance of Texas's 2011 legislative and congressional maps found that Texas fell short when it relied on a demographics-only approach to determine whether a district provided minorities with the "ability to elect." *Id.* Rather, as the district court admonished, "Given its history, Texas cannot overlook education and employment levels affecting minority electoral participation and remnants of historic discrimination that may

continue to affect voting in some areas of the State." *Id.* As the court explained, many factors are relevant to the "complex" retrogression analysis:

> We conclude that the type of factors relevant to this complex inquiry may include the number of registered minority voters in redrawn districts; population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidate of choice; an assessment of voter turnout in a proposed district; to the extent discernible, consideration of future election patterns with respect to a minority preferred candidate.

Id. at 264-65.

The 2011 Texas preclearance case is instructive both on why a demographics-only approach does not work and why there is an inherent risk of manipulation in that approach. In one Texas congressional district, the court found that mapdrawers had "tried to make the district more Republican – and consequently, less dependable for minority-preferred candidates – without changing the district's Hispanic population levels." *Texas v. United States*, 871 F. Supp. 2d 133, 155 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013). To do this, the Texas mapdrawers had engaged in a sleight of hand that "replaced many of the district's active Hispanic voters with low-turnout voters in an effort to strengthen that voting

power of [the district's] Anglo citizens." *Id.* The result was "enough to 'nudge' a district that was an ability [to elect] district, but barely so, to a non-performing one." *Id.* Viewing the maps with the more nuanced analysis that Section 5 requires, the court found several examples of retrogression that would not have been captured by the mechanical approach used by Texas:

> Several districts in the proposed plans show that population statistics alone rarely gauge the strength of minority voting power with accuracy. For example, . . . Congressional District 23 and House District 117 were selectively drawn to include areas with high minority populations but low voter turnout, while excluding high minority, high turnout areas. Such districts might pass a retrogression analysis under Texas's population demographics test . . . , even though they were engineered to decrease minority voting power.

Texas v. United States, 887 F. Supp. 2d at 140 n.5.

In this case, the flaw was not that Alabama adopted a numeric racial population target, or even that it was a rigid one, but that it did so in a vacuum without any kind of investigation or consideration of community concerns, electoral representation, or performance factors which would more carefully safeguard the hard fought gains of minority communities. What Alabama did was a cartoon version and mockery of what Section 5 actually requires.

C. *Invalidating the Tainted Maps Will Promote Legislative Accountability*

By adopting racial quotas based on an erroneous interpretation of federal law, Alabama prevented its legislature from considering the full range of options before it. Acknowledging that African Americans in many places may no longer need supermajority districts would have allowed the Alabama legislature greater flexibility in giving force to other "traditional redistricting principles" such as keeping school districts, towns, and other natural and political boundaries together – issues that the record reflects were important to the very African-American community that the quotas in this case ostensibly were designed to serve. *See* Brief of Appellants Alabama Legislative Black Caucus, et al., *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, No 13-895 (August 13, 2014), at 16.

Invalidating the redistricting map and instructing Alabama to draw new districts without the use of rigid artificial racial quotas would further accountability. It would allow Alabama officials to draw constitutionally permissible districts without the distorting influence of an incorrect assumption about the requirements of federal law. In the same way, this Court analogously has reversed and remanded cases where state Supreme Courts have construed a state constitution in harmony with what it erroneously believes a parallel federal constitutional provision requires. *See, e.g.*, *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam); *Ohio v. Johnson*, 467 U.S. 497, n. 7 (1984);

South Dakota v. Neville, 459 U.S. 553 (1983); *Michigan v. Long*, 463 U.S. 1032 (1983).

Redistricting requires important and sensitive decisions concerning the intersection of race, partisan politics, and constitutional law. The weighty issues involved deserve the legislature's accurate and unfettered consideration and judgment. The Alabama lawmakers should be permitted to make these decisions with an accurate understanding of their lawful options and obligations under federal statutory and constitutional law.

Vacating and remanding to the Alabama legislators would also serve as a prophylactic measure against the invocation of federal law as a pretext for improperly motivated decisions regarding race and partisan politics. This would further benefit the democratic process by allowing Alabama voters to pass judgment on their representatives with a correct understanding of the allocation of responsibility. Voters should be allowed to understand the actual constraints and options facing their elected representatives, particularly on such a critical democratic issue as redistricting. Alabama officials should be accountable to informed voters, and not able to falsely blame federal law for their decisions.

III. The Court's Section 2 Jurisprudence Shows How a Factual Analysis Helps Avoid the Pitfalls of Alabama's Approach

Both the Constitution and Section 5 require a factual analysis before adopting racial population targets in a redistricting context.

Although this Court has had limited opportunity to elaborate on the contours of that analysis under Section 5, it has set forth a detailed inquiry for determining when majority-minority districts are required as a remedy for vote dilution under Section 2 of the Voting Rights Act. While the legal standards under Section 2 and Section 5 are different, the Court's careful, fact-driven approach in Section 2 cases shows how a nuanced factual inquiry can be used to assess race discrimination issues in the redistricting context while avoiding the constitutional morass in which it finds itself.

In Section 2 cases, this Court laid out three necessary factual preconditions for the need to create new majority-minority districts:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate.

Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). These factors – now commonly known as the "*Gingles* factors" – are not the end of the inquiry. *Id.* at 79. If they are satisfied, the trier of fact then still must

"consider the 'totality of circumstances' and determine, based 'upon a searching practical evaluation of the "past and present reality,"' whether the political process is equally open to minority voters." *Id.* (citations omitted). Justice Brennan, writing for the Court in *Gingles*, explained, "This determination is peculiarly dependent on the facts of each case and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Id.* The factors the Court found relevant under the "totality of circumstances" included findings of "racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice," which "acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and elect candidates of their choice." *Id.* at 80.

Throughout its Section 2 jurisprudence the Court has stressed that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). A nuanced factual inquiry ensures that the Voting Rights Act is sensitive to changed factual circumstances and that its remedies will not be invoked inappropriately. Indeed, in *Johnson v. De Gandy*, this Court expressly rejected Florida's argument that a jurisdiction enjoyed a "safe harbor" from review if it created minority-controlled seats in proportion to a minority group's share of the total population because such a rule would "promote and

perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." 512 U.S. 997, 1019-20 (1994). Instead, the Court explained:

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Id. at 1020.

What distinguishes Section 2 vote dilution cases from Alabama's vision of Section 5 is that the former is fact based. As society and circumstances change, so will the degree to which Section 2 comes into play. If, for example, the day comes when a community in Alabama (or elsewhere) no longer experiences racially polarized voting, then the need to draw a majority-minority district also will cease.

Likewise, if a minority community becomes spread out because of an end to residential segregation, then it may become impossible to draw a compact district in which a minority community comprises more than 50% of the population. In other words, Section 2, as interpreted by this Court, has a number of built-in safeguards that ensure that consideration of race in redistricting has a case-by-case application and expiration date. This is in keeping with what this Court has stressed is the role of such districts as "remedial devices." *De Grandy*, 512 U.S. at 1020.

Although Section 2 is not at issue in this case, this Court's jurisprudence on Section 2 is instructive on what more carefully constructed efforts to comply with Section 5 could look like. Regardless of the details of the factual inquiry needed to determine what district lines and racial population targets were needed to prevent "retrogression" under Section 5, the Constitution required that Alabama undertake such an inquiry. Alabama did not do so, and so it should be required to redraw its maps using an appropriate analysis.

CONCLUSION

For the above reasons, the decision of the three-judge court for the United States District Court for Middle District of Alabama should be reversed and remanded.

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, et al.,

Appellants,

v.

THE STATE OF ALABAMA, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

BRIEF OF *AMICI CURIAE* PROFESSORS RONALD KEITH GADDIE, CHARLES S. BULLOCK, III, AND STEPHEN ANSOLABEHERE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*

Amici are professors of political science, government, and statistics, and have written, published, and testified about voting rights and redistricting.[1] They have won numerous prizes and awards for their work in these areas. *Amici* take no position on whether the Alabama redistricting plan at issue in this case is constitutional. Rather, they write to provide this Court with critical information regarding African-American voter registration and turnout in Alabama over the past three decades.

Amicus Ronald Keith Gaddie (http://faculty-staff.ou.edu/G/Ronald.K.Gaddie-1/vita.pdf) is a Professor of Political Science at the University of Oklahoma. His book *The Triumph of Voting Rights in the South*, co-authored with Charles S. Bullock, III, received the V.O. Key Jr. Award for outstanding book on Southern Politics from the Southern Political Science Association. He testified before the U.S. Senate Judiciary Committee on the renewal of Section 5 of the Voting Rights Act in 2006.

Amicus Charles S. Bullock, III (http://spia.uga.edu/uploads/vitae/Charles_S._Bullock%2C_III_2012_Vitae.pdf)

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel have made a monetary contribution toward its preparation or submission. By letters filed with the Clerk, counsel for all parties have consented to this filing.

is the Richard B. Russell Professor of Political Science at the University of Georgia. He is a member and former president of the Southern Political Science Association. As noted, he co-authored the award-winning book *The Triumph of Voting Rights in the South* with Keith Gaddie.

Amicus Stephen Ansolabehere (http://scholar.harvard.edu/files/sansolabehere/files/sda_vita.pdf) is Professor of Government at Harvard University. He has been elected Fellow of the American Academy of Arts and Sciences and is on the editorial boards of the *American Journal of Political Science*, *Election Law Journal*, *Legislative Studies Quarterly*, *Public Opinion Quarterly*, and *Business and Politics*. He is a founding member of the Caltech/MIT Voting Technology Project.

INTRODUCTION AND SUMMARY OF ARGUMENT

In evaluating retrogression under Section 5 of the Voting Rights Act, the Department of Justice employs a "functional analysis of the electoral behavior within the particular jurisdiction." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011). Under this approach, "voter registration and turnout information . . . [is] very important to an assessment of the actual effect of a redistricting plan." *Id.*

In the context of this redistricting case invoking Section 5 principles, *amici* here provide the Court with precisely this information with respect to Alabama. The data demonstrate that, over the course of the last three decades, African-American voter registration and turnout in the State has not only increased, it has surpassed white voter participation.

ARGUMENT

In *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), this Court relied upon Census Bureau data in recognizing improvements in African-American voter participation in the six states originally covered by Section 5. *See id.* at 2626 (citing Dep't of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for State (Table 4b)). This same data reveal that the racial disparity in voter participation in Alabama has diminished in recent years.[2]

[2] All of the data reflected in this brief has been obtained from the following sources: Charles S. Bullock, III & Ronald Keith Gaddie, *The Triumph of Voting Rights in the South*, App. B, 379-85 (2009) (providing registration and voter turnout data from 1980-2006), and U.S. Dep't of Commerce, Census Bureau, Reported Voting and Registration by Sex, Race and Hispanic Origin, for States (Table 4b), *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html (providing data for 2012); http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html (providing data for 2010); http://www.census.gov/hhes/www/socdemo/voting/publications/p20/

(Continued on following page)

Table 1. Alabama Voter Registration Data by Race and Ethnicity

Year	Racial Group	Registration Rate	Gap
1980	Black	62.2%	11.1
	White	73.3%	
1982	Black	57.7%	12.5
	White	70.2%	
1984	Black	71.4%	5.8
	White	77.2%	
1986	Black	75.4%	-1.1
	White	74.3%	
1988	Black	68.4%	6.6
	White	75.0%	
1990	Black	65.3%	9.6
	White	74.9%	
1992	Black	71.8%	7.5
	White	79.3%	
1994	Black	66.3%	7.0
	White	73.3%	
1996	Black	69.2%	6.6
	White	75.8%	
1998	Black	74.3%	-0.2
	White	74.1%	
	Non-Hispanic White	74.5%	
2000	Black	72.0%	2.5
	White	74.5%	
	Non-Hispanic White	74.9%	

2008/tables.html (providing data for 2008). These data were originally collected in various Current Population Surveys (CPS) conducted since 1980 by the Census Bureau; details on the CPS are available at http://www.census.gov/cps.

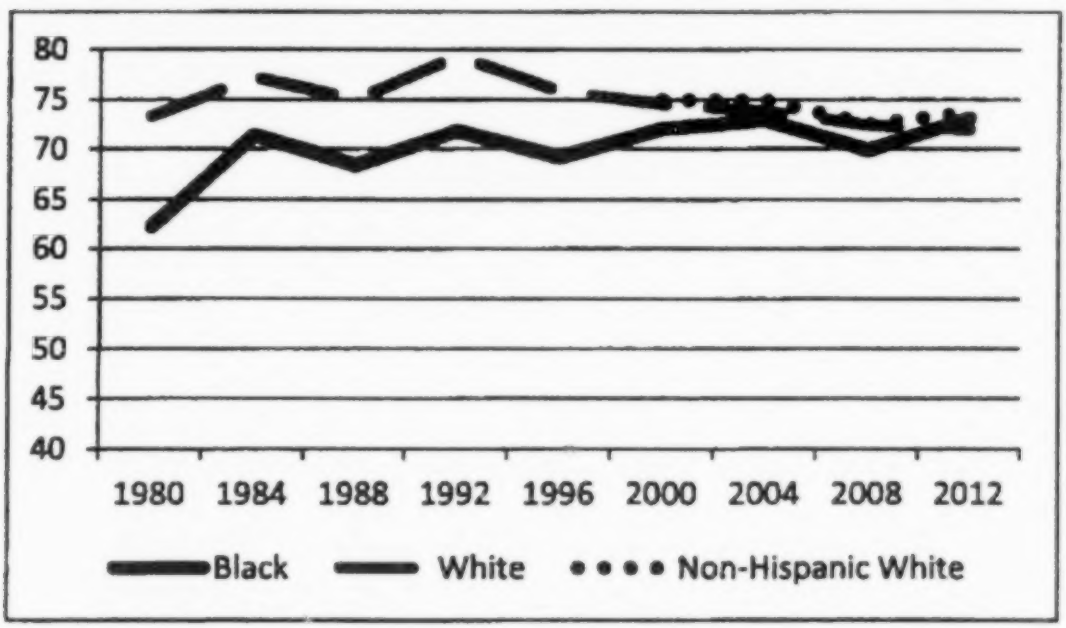
2002	Black	67.6%	6.1
	White	73.7%	
	Non-Hispanic White	74.2%	
2004	Black	72.9%	0.9
	White	73.8%	
	Non-Hispanic White	74.9%	
2006	Black	71.8%	1.2
	White	73.0%	
	Non-Hispanic White	74.5%	
2008	Black	69.9%	2.5
	White	72.4%	
	Non-Hispanic White	72.5%	
2010	Black	69.0%	-5.0
	White	64.0%	
	Non-Hispanic White	64.5%	
2012	Black	73.1%	-1.2
	White	71.9%	
	Non-Hispanic White	73.7%	

As reflected in Table 1, by 1980, 62.2% of voting-age African Americans in Alabama reported having registered. The comparable figure for the share of the white voting age population claiming to be registered was 73.3%, a difference of 11.1 percentage points between the two racial groups. During the 1980s, approximately 7% more whites than African Americans were registered. The greatest disparity in white and African-American registration, 12.5 points, occurred in 1982.

In 2000, that gap had shrunk to 2.5 points, and throughout the next decade, approximately 2.1% more whites than African Americans were registered.[3]

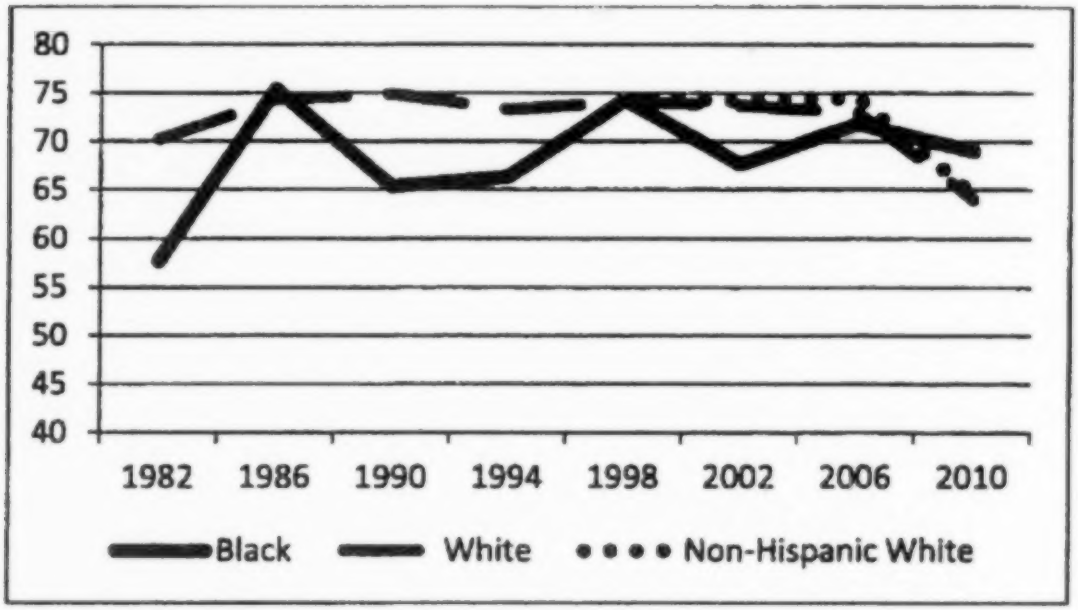
In 2010, African-American voter registration exceeded white voter registration by a full 5 percentage points. Similarly, in the 2012 presidential election, a larger proportion of African Americans (73.1%) than whites (71.9%) had registered.

Figure 1: Black, White, and Non-Hispanic White Voter Registration for Alabama, Presidential Election Years



[3] The Census Bureau provides separate figures for non-Hispanic whites as of 1998. *See* U.S. Dep't of Commerce, Bureau of the Census, Census 2000 Brief: The Hispanic Population (2001), *available at* www.census.gov/prod/2001pubs/c2kbr01-3.pdf. For ease of comparison, all of the gaps in voter registration and turnout rates reported here are calculated without reference to data for non-Hispanic whites.

Figure 2: Black, White, and Non-Hispanic White Voter Registration for Alabama, Midterm Election Years



The racial disparity in voter turnout over that time has also diminished.

Table 2. Alabama Voter Turnout Data by Race and Ethnicity

Year	Racial Group	Turnout Rate	Gap
1980	Black	48.9%	10.3
	White	59.2%	
1982	Black	41.2%	10.8
	White	52.0%	
1984	Black	54.8%	8.0
	White	62.8%	
1986	Black	55.2%	-2.7
	White	52.5%	
1988	Black	52.4%	6.0
	White	58.4%	

1990	Black	45.7%	7.0
	White	52.7%	
1992	Black	58.1%	7.8
	White	65.9%	
1994	Black	53.5%	10.8
	White	64.3%	
1996	Black	54.3%	2.0
	White	56.3%	
1998	Black	51.6%	0
	White	51.6%	
	Non-Hispanic White	51.9%	
2000	Black	57.2%	3.6
	White	60.8%	
	Non-Hispanic White	61.1%	
2002	Black	43.3%	7.4
	White	50.7%	
	Non-Hispanic White	51.3%	
2004	Black	63.9%	-1.7
	White	62.2%	
	Non-Hispanic White	63.1%	
2006	Black	47.8%	1.8
	White	49.6%	
	Non-Hispanic White	50.5%	
2008	Black	62.5%	-0.1
	White	62.4%	
	Non-Hispanic	62.5%	
2010	Black	46.4%	-2.9
	White	43.5%	
	Non-Hispanic White	44.0%	
2012	Black	66.2%	-4.0
	White	62.2%	
	Non-Hispanic White	64.1%	

In 1980 the Census Bureau estimated that 48.9% of eligible African Americans voted in the general election, compared with 59.2% of whites, a disparity of 10.3 percentage points. As reflected in Figures 3 and 4, over the course of the next three decades, African-American and white turnout rates fluctuated, with the gap between the two trending narrower over time. In 1990, 7% more whites than African Americans cast a ballot; in 2000, the gap was 3.6 percentage points.

In 2004, a larger proportion of African Americans (63.9%) than whites (62.2%) turned out to vote. African Americans have turned out at higher rates than whites in four of the five most recent national elections, including the three most recent presidential elections. In the 2006 midterm election, when white turnout exceeded African-American turnout, the disparity was only 1.8 percentage points, with 47.8% for African Americans and 49.6% for whites.

Figure 3: Black, White, and Non-Hispanic White Voter Turnout for Alabama, Presidential Election Years

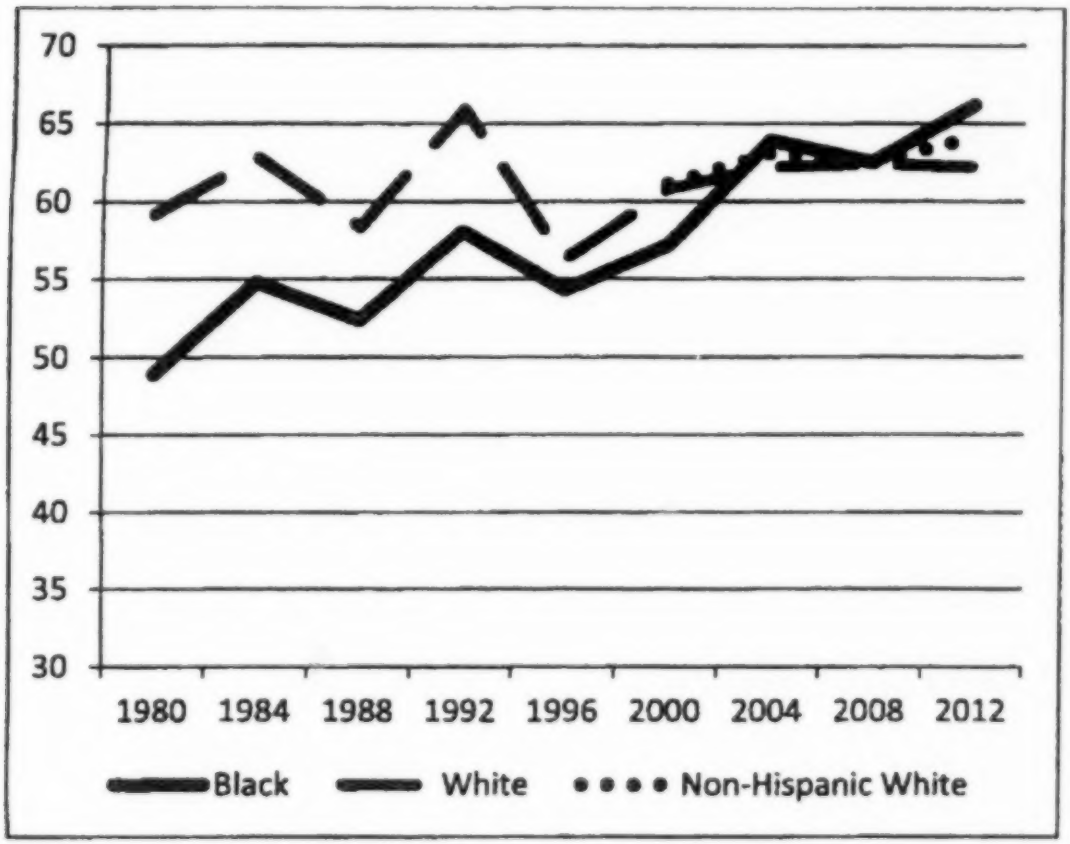
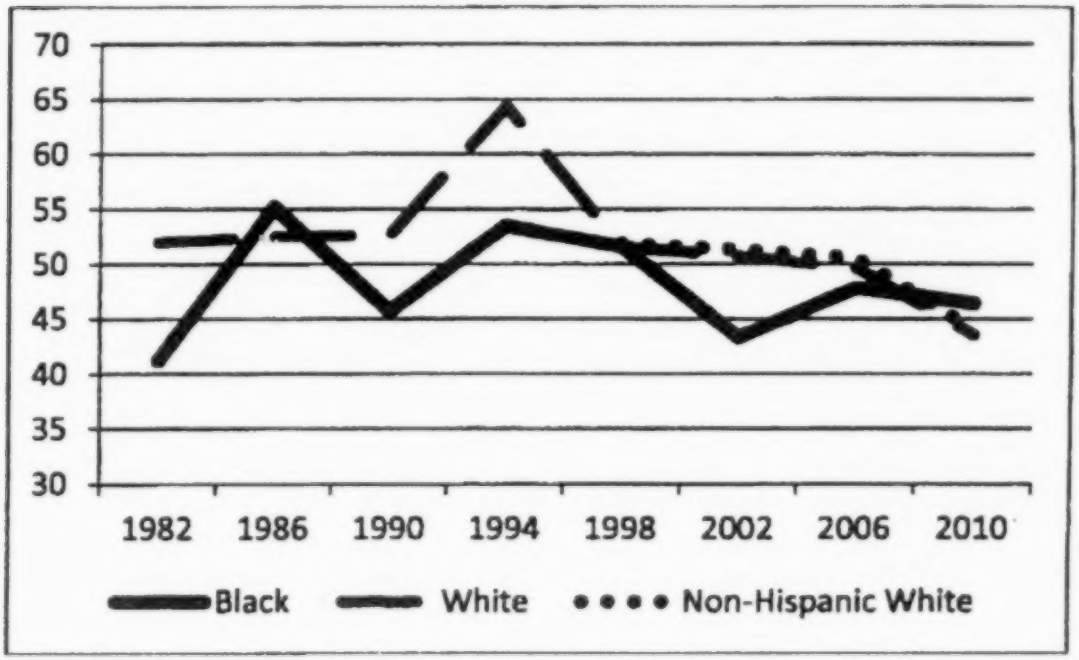


Figure 4: Black, White, and Non-Hispanic White Voter Turnout for Alabama, Midterm Election Years



CONCLUSION

In deciding this case, this Court should take into consideration the voter registration and turnout information in Alabama over the last three decades, which is an integral component of any Section 5 analysis. *Amici* set forth that data here. Over that time, Alabama has seen the gap between African-American and white voter participation narrow significantly, with African-American registration and turnout

actually exceeding white registration and turnout in recent elections.

Respectfully submitted,

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August 20, 2014

AMICUS CURIAE BRIEF

Nos. 13-895, 13-1138

In The

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,
Appellants,

v.

ALABAMA, *et al.*,
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ALABAMA DEMOCRATIC CONFERENCE, *et al.*,
Appellants,

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ALABAMA, *et al.*,
Appellees.

On Appeals from the United States District Court
For the Middle District of Alabama

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to assure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Committee's work. The Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g., Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

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[1] No counsel for a party has authored this brief in whole or in part, and no counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of amicus briefs.

SUMMARY OF ARGUMENT

These appeals raise serious questions of racial gerrymandering under *Shaw v. Reno*, 509 U.S. 630 (1993), and the misuse of federal civil rights protections, specifically Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, with respect to Alabama's 2012 state legislative redistricting plans.

For the reasons set forth below, neither appeal is in an adequate posture for this Court to either reverse or affirm. The judgments of the District Court dismissing the Appellants' *Shaw* claims should be vacated, and these appeals should be remanded to the District Court for reconsideration under the proper legal standards. On remand, the District Court may elect to reopen the record to permit the plaintiffs and the defendants to supplement the record with the benefit of this Court's guidance.

The District Court committed at least three significant legal errors that require *vacatur* of its finding that race was not the predominant motive for any district under *Miller v. Johnson*, 515 U.S. 900 (1995).

First, the District Court failed to conduct a district-specific analysis with respect to several crucial categories of evidence presented by the Appellants, including racially-imbalanced precinct splits, county splits and population swaps. The District Court unjustifiably confined its review of district-specific data to aggregate statistics, and

failed to assess the Appellants' evidence of racial gerrymandering district-by-district.

Second, the District Court treated the State's 2001 redistricting plans as a safe harbor for the 2012 redistricting. However, current conditions in Alabama should have been the touchstone of its review. The District Court thus erred by requiring the Appellants to demonstrate that conditions had materially changed relative to 2001.

Third, the District Court uncritically accepted the State's 2% population deviation target as an across-the-board non-racial explanation for the Appellants' substantial evidence of specific district boundaries that departed from traditional districting principles. The District Court erred by failing to consider whether alternative district boundaries could have met the State's 2% population deviation while avoiding racially-imbalanced precinct splits, county splits and population swaps.

Due to these legal errors, the District Court's factual findings on predominant motivation are inadequate for plenary review here.

On the other hand, the Court should decline the Appellants' invitation to bypass the standards for triggering strict scrutiny set forth in *Miller v. Johnson*, *supra*. The Appellants rest their claims upon Alabama's 2012 redistricting goal of keeping the black voting-age population percentages in each of the pre-existing majority-black state house and senate districts undiminished. While the Appellants

have identified several instances in which those district boundaries appear to have been distorted for racial reasons, they cast a much broader net, arguing that strict scrutiny is triggered for both redistricting plans as a whole on the basis of the State's redistricting criteria alone.

Such a generalized equal protection claim would represent a substantial, unnecessary and infeasible expansion of the current workable standards for assessing predominant motivation under *Miller*. *See United States v. Hays*, 515 U.S. 737, 746-747 (1995). The Court's *Shaw* jurisprudence to date has pointedly been conducted on a district-specific basis, including the requirements for plaintiffs' standing, the alleged harms and the remedies.

It is particularly important for this Court to consider how difficult it would be to translate a finding of liability on this record into an effective and judicially-efficient remedy. As the record now stands, the District Court would have few if any parameters to inform the remedial proceedings. The generalized theories of liability advocated by the Appellants provide no standards to distinguish constitutional from unconstitutional districts in a redrawn plan. The serious and potentially wide-reaching effects of a remedy in this case warrant a remand to make adequate findings for the essential purposes of clarifying the grounds for liability and effectuating a just remedy.

Finally, the status of Section 5 of the Voting Rights Act presents a dilemma. The Court's general jurisprudence strongly suggests that the decision in

Shelby County v. Holder, *supra*, vitiated any Section 5 compliance interest for post-2006 voting changes in Alabama, although the Court could fashion an exception in recognition of States' general reliance interests. To the extent that the Court finds that Section 5 can constitute a potentially compelling interest in this case, the District Court's contingent analysis of the standards for preclearance under Section 5 of the Voting Rights Act, which accepted Alabama's reading of those standards wholesale, was patently erroneous as a matter of law.

ARGUMENT

I. THE DISTRICT COURT MUST REWEIGH THE EVIDENCE UNDER THIS COURT'S ESTABLISHED LEGAL STANDARDS FOR DETERMINING WHETHER AN ELECTION DISTRICT IS A RACIAL CLASSIFICATION

A. This Court Applies a Well-Understood Analysis Under *Shaw v. Reno* to Decide Whether a Challenged Election District is a Racial Classification Subject to Strict Scrutiny

Claims of racial gerrymandering under *Shaw v. Reno*, *supra*, are "analytically distinct" because they are not based upon vote dilution principles, but rather involve an excessive emphasis upon racial considerations in redrawing election districts. *Shaw v. Reno*, 509 U.S. at 652. *Shaw* recognized that redistricting decision-makers routinely and unavoidably are aware of the racial consequences of their districting choices and that constitutional

concerns are not triggered by an awareness of race. *Id.* at 642.

Miller v. Johnson, *supra*, set out what is by now a well-understood analysis for identifying districts that require a compelling interest and narrow tailoring to be upheld. That analysis clearly distinguishes routine considerations of race from situations in which racial considerations have distorted the redistricting process:

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a

> particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."

Miller v. Johnson, 515 U.S. at 916, *quoting Shaw v. Reno*, 509 U.S. at 647 (internal citations omitted).

Shaw claims are tightly focused upon the bounding choices affecting specific districts. This Court never has applied strict scrutiny solely upon a State's decision to achieve a particular racial percentage within a particular district. Neither awareness of racial demographics, nor irregular shape, nor split political subdivisions is sufficient alone to trigger strict scrutiny. *See Shaw v. Reno*, 509 U.S. at 633-634 (12th Congressional District in North Carolina); *Shaw v. Hunt*, 517 U.S. 899 (1996) (same); *Easley v. Cromartie*, 532 U.S. 234 (2001) (same); *United States v. Hays*, 515 U.S. at 741-742 (2nd and 4th Congressional Districts in Louisiana); *Miller v. Johnson*, *supra* (11th Congressional District in Georgia); *Abrams v. Johnson*, 521 U.S. 74, 77-78 (1997) (2nd and 11th Congressional Districts in Georgia); *Bush v. Vera*, 517 U.S. 952 (1996) (18th, 29th and 30th Congressional Districts in Texas). *See*

also King v. Illinois State Bd. of Elections, 522 U.S. 1087 (1998) (summarily affirming three judge court decision concerning 4th Congressional District in Illinois).

Since the decision in *Easley v. Cromartie* in 2001, this Court has not had occasion to decide further *Shaw* claims, largely because the *Miller* standards are well-understood and have been followed.

B. The District Court Applied Erroneous Legal Standards in Concluding that the Challenged Election Districts are not Racial Classifications

The District Court ruled that "[r]ace was not the predominant motivating factor for the Acts as a whole. And race was not the predominant motivating factor for drawing Senate Districts 7, 11, 22, or 26." J.S. App. at 140.[2] Although the District Court did find that "race was a factor in the creation of the districts," it found that "the Legislature did not subordinate traditional, race-neutral districting principles to race-based considerations."[3] *Id.* at 143.

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[2] "J.S. App." refers to the Appendix attached to the ALBC Appellants' Jurisdictional Statement.

[3] The District Court rejected all of the plaintiffs' racial gerrymandering claims by finding that none of them met the threshold burden of establishing that the Legislature subordinated race-neutral traditional districting principles to race. J.S. App. at 140-173 (relying, *inter alia*, on *Bush v. Vera*, 517 U.S. at 964-965 (only when race is the predominant factor motivating the legislature's redistricting decision will strict scrutiny apply.)) Although the majority acknowledged that race was a factor in the creation of the districts, it concluded that

Because the District Court committed several serious errors of law that jeopardized the validity of these findings and its ultimate disposition of the Appellants' claims, its judgments should not be affirmed. The case should be remanded to the District Court for reconsideration under correct legal standards.

1. The principal flaw in the District Court's analysis is that it failed at critical junctures to conduct a district-specific analysis of the Plaintiffs' evidence. To be sure, the District Court did provide some discussion of individual challenged districts. *See, e.g.*, J.S. App. at 36-43, 166-173. However, this was largely confined to describing aggregate population shifts and overall district populations.

The Appellants provide persuasive examples of the District Court's failure to properly analyze evidence of racially-disparate precinct splits and racially-disparate county splits. *See, e.g.*, ADC Br. at 12-19; ALBC Br. at 12-13, 41-54.

The District Court's legal analysis of the split-precinct evidence was further marred by its treatment of the Voting Rights Act considerations as being non-racial in nature. The District Court asserted that Mr. Hinaman's "testimony confirms

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racial considerations were not the predominate motivation and, instead, "one person, one vote trumped every other redistricting principle." J.S. App. at 151-152. The majority found that Mr. Hinaman, the consultant who drew the redistricting maps for the Republican majority in the Legislature, "balanced and satisfied five lawful objectives with respect to the majority-black districts in the plan." *Id.* at 146-147.

that race was not the predominant motivating factor in precinct splitting." J.S. App. at 159.

However, the District Court immediately followed that assertion with the statement that "where it occurred, precinct splitting was less of an evil to be avoided in redistricting than the subordination of other redistricting criteria, such as compliance with the Constitution and the Voting Rights Act." *Id.* The District Court thus appears to have reasoned that precinct splitting was a lesser evil than failing to comply with the Voting Rights Act. That may – once strict scrutiny review is complete – prove to be correct. But for purposes of a predominant motivation analysis, it represents a critical concession by the District Court that "where it occurred" in the challenged plans, the precinct splitting was racial in nature.

This confusion of Voting Rights Act compliance with non-racial factors is shown by the District Court's supporting citation to *Larios v. Cox*, 314 F. Supp. 2d 1357, 1360 (N.D. Ga. 2004) (stating that traditional districting principles "*of compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, and recognizing communities of interest*" were secondary to ensuring compliance with the Constitution and the Voting Rights Act) (emphasis in original).

The District Court's error is further confirmed by its subsequent supporting citation to the Department of Justice's "Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act," 76 Fed. Reg. 7470-01 (Feb. 9, 2011) (explaining that

"compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain redistricting criteria," such as precinct splitting, "to avoid retrogression"). J.S. App. at 159.

Compliance with the Voting Rights Act, as properly interpreted, is a compelling state interest, but it is racial in nature. The Voting Rights Act in some circumstances properly can require a jurisdiction to make a limited departure from strict adherence to certain traditional redistricting criteria such as precinct splitting, but that departure is decidedly not non-racial in nature. The District Court thus erred as a matter of law by finding that the State's professed VRA compliance provided a non-racial explanation for precinct splitting "where it occurred."

It is possible that the county and precinct splitting in the challenged plans can be attributed to non-racial objectives. It is equally if not more plausible, however, that these were predominantly attributable to the objective of achieving specific racial population thresholds. If that is the case, then strict scrutiny is implicated under *Miller*. A substantial portion of this Court's opinion in *Cromartie* involved parsing just this type of evidence to determine whether the district court had correctly inferred the State's motivations in distinguishing racially-driven precinct splits from partisan-driven precinct splits. *Easley v. Cromartie*, 532 U.S. at 244-257.

The Appellants also explain how the District Court overlooked other strong evidence of racial boundary manipulations in Senate Districts 25 and 26. ALBC Br. at 49-54; ADC Br. at 12-15.

The District Court's failure to review highly-relevant district-specific evidence of boundary manipulations and other departures from traditional districting principles represented a fundamental analytic error that prevented the District Court from making critical factual findings, and may well have altered the District Court's ultimate conclusions about whether any of the challenged districts were racial classifications. These errors warrant the appeals to be remanded for further fact-finding under the correct legal standards.

2. The District Court erroneously treated the State's 2001 redistricting decisions as representing the baseline for constitutional compliance while fundamentally disregarding current conditions.[4] Specifically, the District Court treated the 2001 Plans, which were upheld in *Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002), as setting the standard for the plaintiffs' claims of racial gerrymandering, which were based upon current conditions. This is illustrated in the following passage:

> We refuse to apply a double standard that requires the Legislature to follow one set of

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[4] The majority concluded that the plaintiffs had not offered any "credible evidence that the percentages of the black population in the majority-black districts adopted in 2001 were no longer warranted." J.S. App. at 163-164.

> rules for redistricting when Democrats control the Legislature and another set of rules when Republicans control it. After the 2000 Census, nothing changed that would have relaxed the constitutional and statutory standards that governed redistricting. On the contrary, in 2006, Congress amended section 5 of the Voting Rights Act to make the standard for retrogression 'more stringent.' *Shelby Cnty.*, 133 S. Ct. at 2617. And in *Larios*, a three-judge district court in this Circuit expressed concern that an overall deviation in population of 10 percent was no longer a "safe harbor" for purposes of the one person, one vote command of the Equal Protection Clause, particularly in the light of developing technology that makes it possible to achieve substantially greater population equality. *At trial, the plaintiffs offered no credible evidence that the percentages of the black population in the majority-black districts adopted only ten years earlier were no longer warranted.*

J.S. App. at 163-164 (emphasis added).

It is axiomatic that current conditions must be the focus for equal protection claims. On remand the District Court should be instructed to give primary weight to current conditions in Alabama.

3. The District Court also erroneously reviewed the State's 2% deviation guideline.

The second prong of the District Court's stated rationale for finding that race was not a predominant

motivation was its assertion that majority-black districts were underpopulated based upon the State's 2% population deviation criterion. J.S. App. at 151-152, 158. This begs the question, however, because it can neither prove nor disprove that any district's boundaries trumped traditional districting considerations for racial reasons.

The Appellants argue that the State could have added nearby majority-white areas to underpopulated majority-black districts, but that overwhelmingly-black areas were added instead in order to maintain specific racial percentages. ALBC Br. at 49-53; ADC Br. at 12-19. This is an argument with teeth. If such changes were done in derogation of traditional districting principles, then *Miller* calls for strict scrutiny.

Notwithstanding what appear to be very specific racially imbalanced boundary changes in the record, the District Court failed to make any finding as to whether these boundary changes were the unavoidable consequence of achieving a 2% deviation. Nor did the District Court make any finding as to whether these boundary changes departed from traditional districting principles.

Specifically, the Appellants point to districts in which overwhelmingly black areas were reassigned to districts that would have remained majority-black even if all of the new population was white. These racially imbalanced population transfers may nominally have been done in service of a 2% deviation, but that does not prove that such transfers were necessary. The Appellants contend that

racially-balanced alternatives were available, ADC Br. at 16-17, 34-35; ALBC Br. at 10, and that some of these districts included racially imbalanced split precincts. ALBC Br. at 46-49; ADC Br. at 12-14.

The District Court thus erred because it gave decisive weight to the generic goal of bringing the underpopulated majority-black districts into one-person one-vote compliance, without considering whether more racially balanced transfers were possible. The District Court then compounded that error by failing to consider the district-specific evidence of racially imbalanced population transfers.

This is an issue of causation and predominant motivation, not narrow tailoring. To illustrate, assume that the State constructed a district using a series of precincts split along racial lines, and that it placed the overwhelmingly black portions of those split precincts within the hypothetical district. If a 2% deviation was unattainable but for that series of split precincts, then the 2% goal has legitimate power as a non-racial explanation. On the other hand, if the 2% goal was attainable without employing such racially imbalanced departures from traditional districting principles, then the 2% goal explains nothing and the *Miller* standard for predominant motivation would be implicated.

This general failure of the District Court's analysis requires reconsideration of the record. On remand, before crediting the State's 2% deviation goal as providing a non-racial explanation for racially imbalanced splits of precincts or counties, the District Court must find that more balanced

population reassignments were not reasonably feasible. On the other hand, if the District Court finds that more-balanced population swaps were reasonably feasible and would have better comported with traditional districting principles, then strict scrutiny is directly implicated.

C. Both Appellants' Theories of Liability Unnecessarily Depart from the Workable *Miller v. Johnson* Formulation

These appeals do not require the Court to expand the circumstances under which an election district must be subjected to strict scrutiny as a racial classification. Both Appellants seek to shortcut the Court's established standards for delimiting presumptively unconstitutional racial classifications from routine election districts, but neither Appellant has set forth a workable decision rule.[5]

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[5] The majority found that only the Alabama Legislative Black Caucus plaintiffs had standing to bring their racial gerrymandering claim. J.S. App. at 134-140. The majority concluded that the Alabama Legislative Black Caucus had standing because it established that its members resided in nearly every challenged district, the parties stipulated that the Alabama Legislative Black Caucus was "composed of every African-American member of the House and Senate," and the Caucus represented voters whose rights to equal protection of the law would be violated by redistricting plans that constituted a racial gerrymander. The Court determined the Alabama Democratic Conference did not have standing because it failed to clearly establish in the record which districts its members resided in based on the new district lines and failed to establish that its members were classified by race in the redistricting plans. *Id.* 134-140.

1. The Appellants expend little effort arguing that the District Court was clearly erroneous with respect to specific districts.[6] Instead, the Appellants propose new constitutional formulations under which entire redistricting plans – not merely individual districts – may be challenged as presumptively unconstitutional racial classifications. The Appellants present somewhat differing theories for reaching strict scrutiny, but neither theory provides a persuasive basis to reverse the District Court.

The ALBC Appellants argue that "[b]ecause race was the predominant motivating factor in the redrawing of the majority-black districts, the state must establish that the redistricting plan satisfied strict scrutiny." ALBC Br. at 54.

The ADC Appellants explicitly reject the rule of standing announced in *United States v. Hays*, *supra*,[7] arguing that "this case involves a constitutional challenge not to the design of any one specific district, but to a statewide policy applied directly in every black-majority district," ADC Br. at 57, and reiterate that "[h]ere, plaintiffs challenge not one district in isolation, but a statewide policy, applied

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[6] The ALBC Appellants provide important examples for the Court, but they provide no systematic analysis of the districts with respect to which they contend the District Court erred as a matter of fact or law. ALBC Br. at 6-9; 12-13; 29-34; 47-54. The ADC Appellants adopt by reference the ALBC merits brief discussion of the District Court's legal error and/or clear factual error in concluding that race was not the redistricters' predominant motive. ADC Br. at 47.

[7] "*Hays* is not the proper framework to analyze standing in this case." ADC Br. at 52.

directly in every majority-black district and necessarily affecting other districts." *Id.* at 54.

This places the ADC in tension not only with *Hays*, but with the Court's fundamental principles of standing. The "irreducible constitutional minimum of standing" requires the plaintiff, *inter alia*, to have suffered an injury in fact which is "concrete and particularized." *United States v. Hays*, 515 U.S. at 743, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). "In light of these principles, we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Id.* "We therefore reject appellees' position that 'anybody in the State has a claim,' and adhere instead to the principles outlined above." *Id* at 744 (internal citation omitted).

Absent a district-specific focus, the ADC claims amount only to generalized grievances. The ADC suggests that the Court should vacate and remand for the District Court to consider the ADC's organizational standing claims. ADC Br. at 55-56. Because remand on other issues is appropriate for the reasons we explain elsewhere in this Brief, remand would provide a suitable opportunity for the ADC to perfect its standing by establishing the specific districts in which the ADC and/or its members claim to suffer "concrete and particularized" injuries.[8]

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[8] The ADC appears to have shown standing for Plaintiff Stallworth, who resides in House District 77. ADC Br. at 52-53.

The ALBC Appellants are less direct in disclaiming *Hays* as the basis for their standing, but their brief similarly fails to identify any specific district or set of districts that they contend to be unconstitutional.

2. Neither Appellant's approach to racial classifications provides a meaningful basis to distinguish constitutionally suspect districts from districts that implicate no equal protection concerns.

The ADC Appellants provocatively cast the State's decisions as a "racial quota" in their jurisdictional statement. ADC J.S. at i; ADC Br. at i. The ALBC Appellants similarly cast the State's decisions as "racial ratios." ALBC Br. at 14-18.[9]

But it must be the *implementation* of the State's target policy, and not the fact that the State had targets *ab initio*, that ultimately determines whether particular districts are racial classifications. The fact that a State set a population target for a district is not a basis for subjecting that district to strict scrutiny if the challenged district does not offend traditional districting principles.

Alabama identified particular minority population percentages as redistricting targets, but this alone cannot establish that the legislature

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[9] The ADC Appellants incorrectly suggest that a State might "stumble" into "excessively-segregated election districts" that violate the Constitution through "good faith." ADC Br. at 3. This Court's equal protection jurisprudence makes clear, however, that intent is necessary for a constitutional violation. *See Washington v. Davis*, 426 U.S. 229 (1976).

subordinated traditional race-neutral districting principles to racial considerations in any particular district that it actually adopted. Nor does the minority population percentage in any district actually adopted by the State necessarily indicate the predominance of race over traditional districting principles.

An election district's minority percentage is not mathematical evidence of racially driven distortions of district boundaries. Reaching a 40% minority target might require extensive geographic contrivances in one region, whereas in another region a 60% minority district could be the natural result of following traditional districting principles to the letter. In other regions, a State might have to violate traditional districting principles in order to *prevent* the creation of a 75% minority district. Needless to say, a district with a 70% minority population does not involve twice the racially driven boundary manipulations of a 35% minority district; neither figure necessarily indicates that any unusual boundary manipulations occurred.

In Alabama, political units of 70% or greater are unexceptional: counties with 70% or greater black population include Bullock (70.59%), Greene (81.85%), Macon (83.13%), Sumter (74.12%), Wilcox (73.08%) and Lowndes (74%).[10] If an election district in Alabama has a black percentage of 70 percent there is no reason to infer that its boundaries

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[10] *See* U.S. Census Bureau 2012 *American Community Survey 5-year Estimates Table B02001.* Many Alabama cities, towns, Census designated places and school districts also have African American populations of 70% or greater. *Id.*

represent a departure from the general rules of redistricting, let alone that such a departure was predominantly attributable to racial considerations, or that it classified voters or stigmatized voters on the basis of their race, any more than a resident of the City of Birmingham, the most populous city in Alabama, could assert a constitutional harm by virtue of the fact that the boundaries of the city yield a 73.4%[11] percent African American municipality. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Alabama unquestionably set out to maintain the pre-existing numbers of majority-black house and senate districts. But this too, standing alone, is insufficient to establish that a racial classification affected any particular district. When adhering to the bounds of traditional districting criteria, some districts may be majority-black and others majority-white, but for constitutional purposes they are "just districts." There is no constitutional basis to deem majority-white election districts as normative, or to presuppose that majority-minority election districts deviate from the norm. Such a rule would abandon this Court's understanding of equal protection because it would create explicitly different rules for black and white citizens.[12]

A State's decision to draw a majority-minority election district, or to set a target minority

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[11] U.S. Bureau of the Census, State and County Quickfacts for Birmingham, Ala. (2010 Census).

[12] *See* ADC Br. at 2 (characterizing districts with black voting-age populations of 29% as "integrated districts," and districts with white voting-age populations of 30% as "super-concentrated black districts.").

percentage in a particular district, are examples of routine race-conscious action, not *prima facie* evidence of a racial classification. States have three choices with respect to the number of majority-minority districts drawn during redistricting: they may decide to maintain the existing number, or to either increase or decrease the existing number. Feigned ignorance of how many majority-minority districts are drawn is not a fourth option; once again, it is unrealistic to suggest that Alabama can, would or should act unaware of the racial implications of its decisions.

Any State with a sizable minority population will be aware of the racial consequences of its boundary changes, particularly where the racial composition of the districts has a predictable and substantial impact on election outcomes, as is the case in Alabama. It is unrealistic to believe that prohibiting States from acknowledging racial considerations in their redistricting decisions will prevent States from having such considerations in the first place. States assuredly will consider the racial impact of their redistricting decisions; a hair-trigger on strict scrutiny merely will require States to resort to ever more subterfuge and dissembling about their redistricting.

Had the State abandoned its initial targets in favor of districts to the Appellants' liking, it is most doubtful that Appellants would have pressed a constitutional claim against the State's redistricting plans, notwithstanding the State's initial targets. Even if Appellants pressed such a claim, this Court would have no reason take cognizance of such an

ephemeral claim if the targets had no practical impact on the actual boundaries. If the Appellants had filed a constitutional challenge after the State had set its targets, but before the final plans were adopted, no ripe Article III dispute would have existed. See *Texas v. United States*, 523 U.S. 296, 297-302 (1998) (declaratory judgment action concerning whether Section 5 of the Voting Rights Act applied to the implementation of certain sections of the Texas Education Code not ripe for adjudication). Any harm inherent in setting such targets only ripens into a case or controversy if it causes the eventual district boundaries to be deformed along racial lines affecting an individual. More colloquially, the proof is in the pudding.

3. Neither of the Appellants has grappled with important remedial shortcomings inherent in their theories of liability.

One of the principal benefits of the *Miller* formulation is that it precisely identifies the remedial obligations of the lower courts. If a district has been drawn with features that subordinate traditional districting principles to race without sufficient justification, then the straightforward remedial obligation of the district court is to ensure that the unconstitutional district is redrawn so as to remove the offending features. If the State fails to do so, then the district court must fashion a remedy that corrects the unconstitutional features but respects the State's districting policies and choices so far as possible. See *Vera v. Bush*, 933 F. Supp. 1341, 1351 (S.D. Tex. 1996). *See also Perry v. Perez*, 132 S. Ct. 934, 941 (2012). Even this may prove

complicated in practice, but when *Miller* is followed both the State and the district court have the benefit of correcting specific identified flaws.

Conversely, if this Court were to reverse the District Court and remand for remedial proceedings based upon the current record, there would be few if any parameters to guide the District Court in fashioning a suitable remedy. On the current record, there are no findings that traditional districting principles were subordinated – whether for racial reasons or for non-racial reasons – with respect to any district. For example, the District Court would have no idea whether any of the State's precinct splits should be respected or disallowed.

Furthermore, the brief for the ALBC Appellants does not identify which districts they contend must be redrawn. The brief for the ADC is somewhat more specific, apparently contending that District 26 was unconstitutional. ADC Br. at 12-15. The ADC also challenged the constitutionality of Senate Districts 7, 11 and 22 at trial. J.S. App. at 166-173.

But neither Appellant appears to have ever clearly identified what it contends to be the constitutionally-acceptable minority percentages for the challenged plans as a whole, nor has either Appellant identified the minority percentages that it contends are required to comply with the Voting Rights Act in remedial house and senate plans as a whole. The District Court made no useful findings on these issues, having found that the plaintiffs'

evidence on this issue was in conflict at trial.[13] The District Court also found that the Appellants provided no alternative redistricting plans that are acceptable under the State's redistricting rules, J.S. App. at 72, 88-89, 114, 116-119, and so there is no finding that an illustrative plan exists to demonstrate the contours of a constitutional plan.

A general admonition to the State to redraw its districts without setting racial targets would have little practical value if the findings of liability do not identify the essential differences between constitutional districts and unconstitutional districts, and would render an attempt to fashion a

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[13] The District Court noted that the ADC plaintiffs' expert, Theodore S. Arrington, testified that "[A] 51 percent voting-age population is enough to give minority voters the opportunity to elect the candidate of their choice anywhere in the State, and he suggested that, "[c]ertainly, 54–56% concentration is enough everywhere. (Ex. NPX 323, 15, 17)." J.S. App. at 91. He explained that, although experts used to think that a minority presence of 65 % was necessary to ensure that the minority group would be able to elect the candidate of its choice, the increased registration and mobilization of black voters has reduced that number. (Ex. NPX 323, 19)." *Id.* However, the District Court noted that Dr. Joe Reed, the Chairman of the Alabama Democratic Conference since 1970, testified that a majority-black district in Alabama ordinarily needed to be about 60% African American in total population to allow African American voters to elect their candidate of choice. *Id.* at 164-165. The Court also cited to testimony by Senator Dial (R), who co-chaired the legislature's redistricting committee, in which he said that State Senator Hank Sanders (D) and State Representative Thomas Jackson (D), who were African Americans representing majority-black districts, requested during public hearings that their districts have an African American population of 62% and 62 to 65%, respectively. *Id.* at 30-31.

remedy on this record an essentially standardless exercise, resulting in further confused appeals to this Court.

The District Court on remand should provide an opportunity for the parties to supplement the record with additional evidence, and then reexamine the record with respect to specific districts.[14]

District-specific findings will permit any eventual remedy to provide a focused, predictable and judicially economical resolution.

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[14] *See, e.g.*, 28 U.S.C. § 2160 (this Court may remand and require such further proceedings as may be just under the circumstances); *Perry v. Perez*, *supra* (remand was ordered where the record was unclear whether the District Court followed the appropriate standards in drawing interim maps for the 2012 Texas elections); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 235-236 (2000) (remand ordered where the record below was unclear on facts germane to the constitutional question to be resolved on appeal); *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992) (although the Court established the legal framework on remand, it found that further factual development in the lower court would be necessary for a final determination); *Rapanos v. United States*, 547 U.S. 715, 757 (2006) (remand ordered due to "paucity" of the record and because of the lower court's application of an incorrect legal standard); *Bragdon v. Abbott*, 524 U.S. 624, 654-55 (1998) ("When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court").

II. THE MERITS OF STRICT SCRUTINY ARE NOT ADEQUATELY PRESENTED FOR PLENARY REVIEW

A. This Court Has No Occasion to Address the Merits of Strict Scrutiny if it Affirms the District Court's Holding that the Challenged Districts are not Racial Classifications

We have argued above that the District Court's predominant motivation analysis is legally and factually flawed under the Court's existing legal standards, and therefore merits a remand for reconsideration under the correct legal standards. If this Court does affirm the District Court's findings that race was not a predominant motivation for any of the challenged districts, however, then that should mark the conclusion of these appeals.

The District Court addressed the Section 5 issue merely as a contingency in the event that its predominant motivation analysis was to be reversed. There is no need to consider whether Section 5 of the Voting Rights Act provided a compelling interest for the State, or whether the challenged plans were narrowly tailored to that interest, if this Court concludes that neither challenged plan has a racially gerrymandered district per *Miller*. "Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones." *Bush v. Vera*, 517 U.S. at 964.

B. The Question of Whether Section 5 of the Voting Rights Act Can Constitute a Compelling Interest is Presented if the Court Reaches the Merits of Strict Scrutiny Review

Section 5, while it applied to Alabama, would provide a compelling interest if the State acted in justifiable reliance upon it. But *Shelby County v. Holder*, *supra*, left Section 5 of the Voting Rights Act functionally inoperative. If this Court reaches strict scrutiny, it will then have to grapple with the question of what force, if any, continues to be exerted by Section 5 of the Voting Rights Act.

The District Court assumed that, notwithstanding *Shelby County* Section 5 could provide a compelling interest for the State's challenged redistricting plans. The District Court then went on to conclude that Section 5 provided such an interest, and that the challenged plans were constitutionally narrowly tailored to that interest. J.S. App. at 176-186. Judge Thompson vigorously disagreed, arguing in dissent that because Section 5 was inoperative with respect to Alabama at the time of the District Court's decision, the District Court was obliged to disregard Section 5 as a possible compelling interest. J.S. App. 267-269.

If as a result of this appeal the District Court takes up the question of remedy, then Section 5 clearly would not provide a constraint on the State or the District Court in fashioning new districts, absent a new coverage enactment by Congress. Yet the District Court found that Section 5 would provide a compelling interest for the State to go on using

otherwise unconstitutional election districts. To uphold the District Court, this Court would therefore have to arrive at the seemingly paradoxical conclusion that Section 5 is simultaneously both dead and alive with respect to post-2006 redistricting in Alabama. Resolving this paradox would turn upon the question of whether Section 5 can justify an otherwise unconstitutional election district solely because it was in force at the time the law was enacted.

The District Court majority cited no legal authority in support of its decision to apply the law existing at the time the Acts were adopted, and the majority's decision was inconsistent with the long-standing general principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974). As the dissent noted below, "changed circumstances may . . . transform a compelling interest into a less than compelling one." J.S. App. at 268, *citing United States v. Antoine*, 318 F.3d 919, 921 (9th Cir. 2003), *cert. denied, Antoine v. United States*, 540 U.S. 1221 (2004).

At least one district court has found that Section 5 objections interposed after 2006 are no longer binding on States. In *Henry D. Howard, et al., v. Augusta-Richmond County, Georgia Commission, et al.*, CV 114-097 (S.D. Ga., May 13, 2014), the District Court determined that the plaintiffs' Section 5 enforcement action with respect to post-2006 voting

changes was moot in the wake of the *Shelby County* decision and dismissed the plaintiffs' claims.

Further, in *Texas v. Holder*, 133 S. Ct. 2886 (2013), the Court vacated the judgment of the three-judge district court for further consideration in light of *Shelby County*. On remand, the District Court dismissed all of the plaintiffs' claims based on *Shelby County*. *See Texas v. Holder*, 2014 WL 3895624 (August 11, 2014) (the District Court discussed the dismissal of the plaintiffs' claims in its decision denying an attorneys' fee claim by one of the parties).[15]

These decisions strongly – if not conclusively – indicate that Section 5 is no longer a constraint on the implementation of post-2006 voting changes.

This Court's general jurisprudence also strongly suggests that *Shelby County* retroactively vitiated any Section 5 interest that might once have existed with respect to the challenged redistricting plans. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), the Court held that when it applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of

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[15] *See also Hall v. Louisiana*, No. 12-00657-BAJ-RLB, 2013 WL 5405656, at *6 (M.D. La. Sept. 27, 2013) (concluding that *Shelby County* applied retroactively to nullify all of the plaintiff's claims); *Bird v. Sumter Cnty Bd. of Educ.*, No. 1:12-CV-76, 2013 WL 5797653, at *3 (M.D. Ga. Oct. 28, 2013) (Finding that after *Shelby County*, "[t]he issue of preclearance is no longer extant").

whether such events predate or postdate the Court's announcement of the rule. *Id.* at 97.

Arguably, a limited exception could be fashioned in this case in recognition of the State's legitimate expectation of consistency in the conduct of its elections. This Court could, in a roughly parallel sense to *Reynolds v. Sims*, 377 U.S. 533 (1964), fashion a rule that would credit a State's justifiable reliance upon the federal redistricting standards in effect when a plan was adopted, even if those standards are later rendered inoperative.[16] As discussed in the following section, that rule would be unavailing in defense of the District Court's unjustifiable interpretation of Section 5 in this case, but it could assist in providing guidance to the District Court on remand or to other courts presented with similar claims.

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[16] In *Reynolds v. Sims*, 377 U.S. at 583-584, this Court found that Alabama's state senate and house districts were unconstitutionally malapportioned, but recognized that there was a need for a limit upon how frequently a state might be required to redistrict in order to achieve population equality. The *Reynolds* Court settled upon ten-year intervals as sufficient. *Id.* In doing so, it was implicit that intervening population changes might result in districts that would not satisfy the constitutional standards, but the state's interests in predictability and continuity provided countervailing considerations.

C. If Section 5 *Can* Constitute a Compelling Interest, the Cases Should Be Remanded to the District Court for Reconsideration Under a Correct Statutory Interpretation

Assuming that this Court: 1) reverses the District Court with respect to the threshold determination regarding racial gerrymandering; 2) concludes that strict scrutiny must apply; and 3) finds that Section 5 of the Voting Rights Act can – as a matter of law – provide a compelling interest, then the case should be remanded to the District Court for reconsideration under a proper reading of Section 5.

The Appellants correctly have identified the irredeemably flawed reading of Section 5 that the State professed to have followed, which was uncritically adopted by the District Court. *See, e.g.*, ALBC Br. at 23-28, 46, 55, 58-61; ADC Br. at 24-43. The District Court cited no authority for its construction of the Section 5 retrogression standard, which in fact contravened this Court's longstanding decisions and ignored the actual administrative practice of the Department of Justice.

When the Court first formulated the retrogression standard in *Beer v. United States*, 425 U.S. 130, 141 (1976), it looked to the functional ability to elect candidates of choice. The Court in *Beer* found that the application of the retrogression standard to the facts of that case was "straightforward." The Court noted that under the previous plan, none of the districts had a clear majority of African American voters and no African Americans had been elected to the New Orleans City Council. Under the new plan,

the Court determined that African Americans would constitute a majority of the population in two of the five districts and a clear majority in one of them. Thus, the Court found that there was every reason to predict that at least one and perhaps two African Americans could be elected to the Council under the plan, and that it was erroneous for the District Court to conclude that the plan violated Section 5. *Id.* at 142.

The Court also construed Section 5 retrogression in a functional sense in *City of Lockhart v. United States*, 460 U.S. 125, 133-134 (1983). The Court, citing *Beer v. United States*, *supra*, held that the changes to the voting system were not retrogressive because they did not "increase the degree of discrimination against blacks." The Court reversed the District Court's findings to the contrary as clearly erroneous and concluded that the changes did not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.

In *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478-479 (1997) (*Bossier I*) the Court looked at the number of majority-black districts, not whether individual-district reductions of the minority population had occurred, in assessing whether the proposed plan was retrogressive.

To the extent that the State might assert that some uncertainty nonetheless remained after these decisions, this Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003) left no doubt whatsoever that preventing retrogression under Section 5 did not lock

States into maintaining preexisting levels of minority population.

Despite the fact that these holdings uniformly applied a functional approach to retrogression under Section 5, the District Court adopted the State's erroneous interpretation of retrogression, i.e., that it could not reduce the relative populations of African Americans in the majority-minority districts, regardless of whether maintaining those percentages was reasonably necessary to protect the opportunity of African Americans in those districts to elect a candidate of their choice.

As the ADC Appellants also correctly note, the Department of Justice's implementation of Section 5 has posed no general barrier to States that reduce the minority percentages within particular election districts. ADC Br. at 27-32. While circumstances naturally vary from case to case, the District Court's categorical interpretation of Section 5 is indefensible both in terms of the federal court standards and what could reasonably be anticipated during Department of Justice Section 5 administrative review.

Accordingly, if this Court reaches the issue, it must vacate the District Court for its inexcusable failure to apply the correct legal standards with respect to Section 5 compliance.[17]

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[17] *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further

D. If Strict Scrutiny Applies and Section 5 of the Voting Rights Act Cannot Constitute a Compelling Interest, then this Appeal is Concluded and the District Court Should Be Reversed

Assuming that this Court: 1) reverses the District Court with respect to the threshold determination regarding racial gerrymandering; 2) concludes that strict scrutiny must apply; and 3) finds that Section 5 of the Voting Rights Act cannot – as a matter of law – provide a compelling interest, then this appeal will be complete, and the judgments of the District Court should be reversed. For the reasons discussed above, it would be premature and likely counterproductive to resolve this appeal by such a reversal, but should the Court do so, the only remaining issue in the case would be remedial proceedings before the District Court.

In the Appellees' Joint Motion to Dismiss or Affirm filed in the *ADC v. State of Alabama* case, the State appears to argue for the first time that its compliance with Section 2 of the Voting Rights Act required that the State retain African American populations in majority-minority districts at a rate of 60-65%, and that as a result, its redistricting plans pass strict scrutiny. *See* Appellees' Joint Motion to Dismiss or Affirm at 21-25.

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proceedings to permit the trial court to make the missing findings"). *See also Rapanos v. United States*, 547 U.S. at 757 (remand appropriate where the lower court applied the incorrect legal standard); *Maracich v. Spears*, 133 S. Ct. 2191, 2208-2209 (2013); *Paroline v. U.S.*, 134 S. Ct. 1710, 1730 (2014).

However, the role of Section 2 as a compelling interest is not properly presented in these appeals. The State never asserted in the District Court that the challenged house and senate plans were narrowly tailored to a compelling interest in complying with Section 2 of the Voting Rights Act.

Such a last-minute assertion of a general interest in Section 2 compliance does not merit plenary consideration by this Court for several reasons. To begin with, because Section 2 was not raised or considered below as a compelling state interest for purposes of strict scrutiny analysis, it is presumptively improper to assert at this juncture.

Furthermore, no exceptional circumstances are present here.[18] Nothing prevented the State from raising Section 2 in a timely fashion; evidently the State simply chose not do so. Furthermore, this Court's order noting probable jurisdiction specifically included Section 5 of the Voting Rights Act as a question presented, but was silent as to Section 2. Order of Probable Jurisdiction, June 2, 2014.

This Court may have the occasion to consider the extent of the Section 2 interest in a future appeal, but the proper case would be one where the lower court has found one or more districts to be racial classifications, the defendants have asserted that their actions were narrowly tailored to ensure compliance with Section 2, and the lower court has

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[18] *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Wood v. Milyard*, 132 S. Ct. 1826, 1934 (2012); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. at 2259 n.9.

specifically assessed the evidence as to whether Section 2 is a compelling interest and the extent to which the challenged district departs from that interest.

For example, this Court summarily affirmed the judgment of a three-judge court in *King v. Illinois State Bd. Elections*, 522 U.S. 1087 (1998). The three-judge court found that a majority-Latino district in Chicago was subject to strict scrutiny because its convoluted boundaries were chosen specifically to unite Latino populations. *King v. Illinois State Bd. of Elections,* 979 F. Supp. 619, 620-626 (N.D. Ill. 1997).

Under this Court's ruling in *Miller*, there was no serious question in *King*, *supra*, that strict scrutiny was required. At the same time, the three-judge court found that this arrangement was a narrowly-tailored response to a very specific geographical dilemma, namely that the African American population in Cook County was sufficiently numerous to maintain three reasonably compact majority-black congressional districts, and that the Latino population was sufficiently numerous to draw a reasonably compact majority-Latino congressional district, but that at least one district had to be non-compact for all four to coexist. *Id* at 623. Finding that Section 2 provided a compelling reason to draw three majority-black districts and one majority-Latino district, the district court found that because the challenged district was non-compact only to the extent needed to perform an "end-run" that linked together geographically-proximate Latino neighborhoods (between which an existing majority-

black congressional district lay), it was therefore narrowly-tailored and constitutional. *Id.* at 623-626.

We have respectfully argued that the correct disposition of these appeals is for the Court to vacate and remand for reconsideration of the threshold racial gerrymandering issue under the proper legal standards. In that event, the District Court may consider reopening the record to provide the parties an opportunity to develop the Section 2 issue with the benefit of this Court's guidance. In particular, a properly conducted district-specific identification of which districts, if any, are racial classifications, and for what reasons, will significantly sharpen the focus of any consideration of the Section 2 interest.

CONCLUSION

For the foregoing reasons, the judgments of the District Court should be vacated and these appeals remanded for further proceedings.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 13-895 & 13-1138

IN THE

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,
Appellants,

v.

ALABAMA, *et al.*,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,
Appellants,

v.

THE STATE OF ALABAMA, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit legal organization established under the laws of New York to assist Black and other people of color in the full, fair, and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation.

LDF has been involved in nearly all of the precedent-setting litigation relating to minority voting rights before state and federal courts, including lawsuits involving constitutional and legal challenges to discriminatory state voter registration laws. *See, e.g.*, *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

United Latin Am. Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (*en banc*); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). As such, LDF has a significant interest in ensuring the full, proper, and continued enforcement of the Voting Rights Act and United States Constitution.

SUMMARY OF THE ARGUMENT

The focus of this brief is whether Alabama's redistricting plan satisfies strict scrutiny under *Shaw v. Reno*, 509 U.S. 630 (1993), *i.e.*, was it narrowly tailored to a compelling state interest. Amicus contends that compliance with the Voting Rights Act (VRA or Act) is a compelling state interest, *see* Part I, but that Alabama's redistricting plan was not narrowly tailored, *see* Part II.

ARGUMENT

I. Compliance with the Voting Rights Act Is a Compelling State Interest.

The Voting Rights Act of 1965 was enacted to "address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the

Constitution.'" *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2618 (2013) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).

In the decision below, the majority and dissent agreed that compliance with the VRA is a compelling state interest. Appendix to the Jurisdictional Statement in No. 13-895 ("J.S. App.") 173 (majority); *see* J.S. App. 244 (dissent). That conclusion is consistent with this Court's guidance in *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), in which all eight Justices who reached the issue agreed that compliance with Section 5 of the Act is a compelling state interest. *See id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part); *id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part).

As Justice Scalia noted in *LULAC*, this Court had upheld Section 5 "as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment to enforce that Amendment's prohibition on the denial or abridgment of the right to vote." *Id.* Thus, at the time of Alabama's redistricting, Section 5 was binding on Alabama by virtue of the Supremacy Clause, which "obliges the States to comply with all constitutional exercises of Congress' power." *Bush v. Vera*, 517 U.S. 952, 991-92 (1996) (O'Connor, J., concurring) (recognizing that compliance with Section 2 of the VRA is a compelling state interest). And, "[i]f compliance with [Section 5 of the VRA] were not a compelling state interest, then a State could be placed in the impossible position of having

to choose," between compliance with the VRA and compliance with *Shaw* and its progeny. *LULAC*, 548 U.S. at 518 (Opinion of Scalia, J.).

The conclusion that compliance with the VRA is a compelling state interest "is bolstered by concerns of respect for the authority of Congress under the Reconstruction Amendments." *Vera*, 517 U.S. at 992 (O'Connor, J., concurring). Racial discrimination in voting causes a grave constitutional injury because it lies at the intersection of race, the most suspect classification, and the right to vote, the right "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As this Court recognized in *Shelby County*, 133 S. Ct. 2631, "any racial discrimination in voting is too much."

Congress has carefully studied the problem of racial discrimination in voting, and it has determined that the Voting Rights Act is necessary to remedy unconstitutional voting discrimination. *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 180-82 (1980) (discussing Section 5); *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (discussing Section 2). These determinations are entitled to respect both because of Congress's expressly delegated authority under the Reconstruction Amendments, and because Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions," *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (citations and internal quotation marks omitted)—questions such as what tools are necessary to remedy a complex and persistent problem like racial discrimination in voting. The failures of legislative

and judicial efforts to address such discrimination prior to the VRA are well-documented. *See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197-98 (2009).

Amicus recognizes that this Court has held that the VRA's section 4(b) coverage provision is unconstitutional. *Shelby County*, 133 S. Ct. at 2629. This Court, however, did not question Congress's authority under the Reconstruction Amendments, or the importance of Congress's institutional role in undertaking legislative factfinding or making predictive judgments in this area. *See Nw. Austin*, 557 U.S. at 205 ("The Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it."). And this Court in *Shelby County* stressed that its holding did not undermine other provisions of the VRA. *See, e.g.*, 133 S. Ct. at 2631 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

In sum, compliance with the VRA is a compelling state interest: the VRA enforces the Reconstruction Amendments, and the Supremacy Clause obligates the States to comply with the Act. As another three-judge court stated in holding that compliance with Section 2 of the VRA is a compelling state interest:

> "In *Shaw*, the Court recognized that a significant state interest exists in eradicating the effects of past racial discrimination, provided the State has a 'strong basis in evidence for concluding that remedial action is necessary.' This

> compelling state interest extends to remedying past or present violations of federal statutes intended to eliminate discrimination in specific aspects of life."

King v. State Bd. of Elections, 979 F. Supp. 619, 622 (N.D. Ill. 1997) (citations and alterations omitted); *summarily aff'd* 522 U.S. 1087 (1998).

II. Alabama's Legislative Redistricting Was Not Narrowly Tailored to Comply with the Voting Rights Act.

Although amicus agrees with the District Court that compliance with the Voting Rights Act is a compelling state interest, amicus disagrees with the conclusion of the majority below that Alabama's legislative redistricting was narrowly tailored.

Amicus recognize that, particularly in the redistricting context, narrow tailoring does not require perfect tailoring. "[T]he 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests." *Vera*, 517 U.S. at 977 (plurality opinion). When a State has a "'strong basis in evidence'" for concluding that its redistricting decisions are "reasonably necessary" to comply with the Voting Rights Act, the redistricting plan is narrowly tailored. *Id.* (discussing Section 2) (citations omitted); *see also LULAC*, 548 U.S. at 519 (Opinion of Scalia, J.) (discussing Section 5).

Thus, districts designed to comply with the VRA that are "*reasonably* compact and regular, taking into account traditional districting principles . . .

may pass strict scrutiny"; they need not "defeat rival compact districts designed by plaintiffs' experts [as hypothetical alternatives] in endless 'beauty contests.'" *Vera*, 517 U.S. at 977 (plurality opinion) (emphasis in original); *see also id.* ("We . . . reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement that 'a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.'") (citation omitted).

Here, the majority of the District Court concluded that Alabama's redistricting was narrowly tailored because the legislature had a strong basis in evidence for believing that: (a) maintaining the number of majority-Black districts; and (b) maintaining the percentages of Black voters in those districts, were both reasonably necessary to comply with Section 5 of the VRA. J.S. App. 183. Amicus agrees with the majority about the first point, but not the second.

A. The VRA Can Require the Creation or Maintenance of Majority-Minority Districts.

Shortly after passage of the VRA, it "became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices. . . . [designed to] reduce or nullify minority voters' ability, as a group, to elect the candidate of their choice.'" *Shaw*, 509 U.S. at 640-41 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). Such unconstitutional efforts to "cancel out or minimize the voting strength" of minority voters, *White v.*

Regester, 412 U.S. 755, 765 (1973), are known as vote dilution. This Court has always interpreted the VRA to prohibit vote dilution, which can "nullify [minority voters'] ability to elect the candidate of their choice just as would prohibiting some of them from voting." *Allen*, 393 U.S. at 569.

A necessary precondition for vote dilution is racially polarized voting, a phenomenon that can be manipulated by jurisdictions to enact districting schemes or other measures (such as at-large voting) that serve to freeze minority voters out of the political process. And in voting, as in many other areas, stark polarization along racial lines has long been an unfortunate reality throughout this country. *See, e.g.*, *LULAC*, 548 U.S. at 427 (majority opinion of Kennedy, J.) (citation omitted) (noting that the district court had found "found 'racially polarized voting' in south and west Texas, and indeed 'throughout the State'").

In a total of "6,667 House elections in white majority districts between 1966 and 1996 . . . only 35 (0.52 percent) were won by blacks." David T. Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts* 10 (1999). This is especially true in Alabama, where, as of 2005, *every* African-American member of the legislature was elected from a single-member district with an effective black voter majority. *See Voting Rights Act: Section 5 of the Act — History, Scope & Purpose: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong. 3199 (Oct. 25, 2005) (statement of James U. Blacksher). Stated

differently, in 2006, Alabama had no Black officials elected statewide, and virtually all Black local officials were elected from majority-minority districts – notwithstanding the fact that Black people comprise more than 26% of the population. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry: Hearing Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary*, 109th Cong. 388-89 (July 13, 2006).

While there has been undeniable progress, "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions . . . ." *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (Kennedy, J.) (plurality opinion). And, while racial polarization has declined in some parts of the country, data from recent federal elections show that in other areas, including Alabama, "the extent of racial polarization in presidential elections *increased* over the past decade," even while "account[ing] for partisan identification," meaning that "the race of the voter continues to constitute a statistically significant factor in determining vote choice even after controlling for party." Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 Harv. L. Rev. F. 205, 210, 218 (2013) (emphasis added).

The 2008 Presidential election results, for example, confirm the existence of extreme racial polarization in Alabama. President Obama received near-unanimous support from Black voters, with 98 percent of Black voters pulling the lever for him, but received support from only 10 percent of white voters in Alabama—his worst showing among the 50 states. Brief of Nathaniel Persily, et al. as Amici Curiae in *Northwest Austin*, No. 08-322, at 11-12. Two additional striking examples of racially polarized voting, "indicative of the racial cleavage that exists in Alabama to this day," were the 2003 and 2004 unsuccessful voter referenda to remove unconstitutional Jim Crow provisions of Alabama's Constitution, including poll tax language. July 13, 2006 Hearing, at 367, 372.

To combat vote dilution, the VRA sometimes requires jurisdictions to create or maintain majority-minority districts. *See, e.g., Georgia State Conference NAACP v. Fayette County Bd. of Commissioners*, 950 F. Supp. 2d 1294, 1312, 1316, 1322, 1326-27 (N.D. Ga. 2013) (finding the creation of a majority-minority district necessary to remedy a Section 2 violation based on the county's use of at-large elections, in combination with racially polarized voting, to prevent Black voters from ever electing candidates of choice to either the county school board or board of commissioners in nearly two centuries). Such districts can be essential to ensuring that the majority, "by virtue of its numerical superiority," does not always defeat the choices of minority voters. *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986). In other words, in light of the

reality of racially polarized voting, majority-minority districts are sometimes necessary for minority voters to have a meaningful opportunity to participate in the political process and to elect candidates of their choice.

Indeed, much of the progress caused by the VRA has been the result of majority-minority districts. In *Northwest Austin*, this Court noted, as one of the VRA's great successes, that "minority candidates [now] hold office at unprecedented levels." 557 U.S. at 202. Such office holding has been made possible because, notwithstanding persistent racial polarization, the VRA has required the creation of majority-minority districts to combat vote dilution. *See, e.g.*, Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation*, in Quiet Revolution in the South 335 (Chandler Davidson & Bernard Grofman eds., 1994) (noting that since the enactment of the VRA, "the increase in the number of blacks elected to office in the South [has been] a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts").

In this case, the Alabama legislature had a strong basis in evidence to believe that racially polarized voting remains stark and persistent in the State, *see* J.S. App. 84-85; and, therefore, amicus agrees with the District Court that maintaining the same number of majority-Black districts was reasonably necessary to comply with Section 5. As this Court has explained, under Section 5's non-retrogression principle, "the minority's opportunity to elect representatives of its choice," may not be

"diminished, directly or indirectly, by the State's actions." *Vera*, 517 U.S. at 983 (plurality opinion) (emphasis omitted); *see also Miller v. Johnson*, 515 U.S. 900, 906 (1995) (Section 5 prohibits "'voting-procedure changes . . . that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'") (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). The Alabama legislature's decision to maintain the same number of majority-Black districts, standing alone, would have passed muster under strict scrutiny.

B. The VRA Does Not Require Fixed Percentages of Minority Voters.

The drafters of Alabama's redistricting plan also attempted to maintain "as closely as possible" the Black population percentage in the majority-Black districts because they believed that doing so was required by Section 5. J.S. App. 33 (majority); J.S. App. 245 (Thompson, J., dissenting). That is not a "correct reading of § 5," which means it cannot justify Alabama's use of race as a predominant factor in these districting decisions. *Shaw v. Hunt*, 517 U.S. 899, 911 (1996); *see* J.S. App. 244 (Thompson, J., dissenting).

As discussed, Section 5 prohibits retrogression, *i.e.*, diminishing minority voters' opportunities to elect candidates of their choice. *See Vera*, 517 U.S. at 983 (plurality opinion). But not all reductions in the minority population of a majority-minority district are retrogressive. Judge Thompson noted an obvious example: reducing a district's Black population from 99% to 98% is not retrogressive

because Black voters will still retain their ability (or opportunity) to elect a candidate of choice in the new district. *See* J.S. App. 253.

The majority below nonetheless concluded that the 2006 Amendments to Section 5, which prohibit retrogression in minorities "ability to . . . elect their preferred candidates of choice," 42 U.S.C. § 1973c, mean that any reduction in the minority population of a majority-minority district violates Section 5. J.S. App. 180.[2] This interpretation, however, "is contrary to the intent of Congress" and "has been rejected by both entities primarily responsible for administering § 5." J.S. App. 251 (Thompson, J., dissenting).

As the majority of the District Court recognized, Congress's intent through the 2006 Amendments was to restore the retrogression standard set forth in *Beer*, 425 U.S. at 130, and reverse what Congress viewed as a departure from that standard in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). *See* J.S. App. 179.

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[2] Although the majority below stated that "the Alabama Legislature correctly concluded that it could not . . . *significantly* reduce the percentages of black voters in the majority-black districts," J.S. App. 180 (emphasis added), what it meant by "significantly" is unclear. The Alabama Legislature did not seek to prevent "significant" reductions in the Black populations of majority-Black districts, it sought to prevent, as much as possible, any reduction in the Black populations of majority-Black districts. *See* J.S. App. 33 (majority); J.S. App. 245 (Thompson, J., dissenting).

Congress's concern with *Georgia* was *not* that the case permitted reductions in the minority population percentage of majority-minority districts (which both the majority and dissent in *Georgia* agreed were not categorically prohibited by Section 5). Instead, Congress's concern was that *Georgia* permitted States to trade "districts where minority voters *had actual ability to elect* in exchange for amorphous influence districts or apparently powerful jobs for minority representatives." J.S. App. 254 (Thompson, J., dissenting) (emphasis added). It is this aspect of *Georgia*, and this aspect alone, which Congress overturned in the 2006 Amendments. *See id.*[3]

Thus, the 2006 Amendments prohibit the dismantling of districts where minority voters have the ability to elect candidates of choice, but the Amendments do not prohibit all reductions in the minority population of a majority-minority district.

Determining whether a district retains the opportunity for minority voters to elect candidates of choice is a fact-specific inquiry, which requires

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[3] The majority below also erred in suggesting that there is a difference between the "ability to elect" standard and the question of whether minority voters have opportunities to elect candidates of choice. J.S. App. 181. As the majority itself recognized, the "ability to elect" standard is simply the *Beer* standard, J.S. App. 179, and this Court equated the *Beer* standard with electoral opportunities for minority voters. *See, e.g.*, *Vera*, 517 U.S. at 983 (plurality opinion); *Miller*, 515 U.S. at 906.

consideration of numerous factors including registration and turnout rates, the size of the minority population, and the severity of racially polarized voting. *Cf. Texas v. United States*, 831 F. Supp. 2d 244, 272 (D.D.C. 2011) ("Section 5 requires a multi-factored, functional approach to gauge whether a redistricting plan will have the effect of denying or abridging minority citizens' ability to elect representatives of their choice. It does not lend itself to formalistic inquiry and complexity is inherent in the statute."). This is equally true under Section 2's "ability to elect" standard. *See Gingles*, 478 U.S. at 45 ("the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process") (citations and quotation marks omitted).

The Department of Justice (DOJ) explained in its guidance to covered jurisdictions after the 2010 census that the Section 5 retrogression inquiry turns on a context-specific comparison of minority voters' electoral opportunities in the new plan as opposed to the benchmark plan, not predetermined numerical percentages:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the

> electoral behavior within the particular jurisdiction or election district.

76 Fed. Reg. 7470-01, 7471 (Feb. 9, 2011).

Consistent with this standard, DOJ granted preclearance to post-2010 redistricting plans that reduced the minority population percentages in majority-minority districts below the levels in the benchmark plans. *See* Brief of Appellant Alabama Democratic Conference at 30-31. Indeed, DOJ had similarly granted preclearance to post-2000 redistricting plans with reductions in the minority populations of majority-minority districts, *including Alabama's*. *See id.* at 28-30; Brief of Appellant Alabama Black Caucus at 3-4.

In sum, nothing in Section 5, as amended in 2006, requires the maintenance of a specific minority population percentage in majority-minority districts. Alabama's redistricting decisions were premised on an incorrect interpretation of the VRA. Therefore, the State's use of a race as the predominant factor in those decisions was not narrowly tailored to its compelling interest in complying with the Act.

CONCLUSION

The judgment of the District Court should be reversed so that the State may enact a new redistricting plan which complies both with the Voting Rights Act and the Constitution.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 13-895 and 13-1138

IN THE

Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, ET AL.
Appellants,

v.

ALABAMA, ET AL.,
Appellees.

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL.
Appellants,

v.

ALABAMA, ET AL.,
Appellees.

On Appeal From The United States District Court For The Middle District of Alabama

BRIEF OF NORTH CAROLINA LITIGANTS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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BRIEF OF NORTH CAROLINA LITIGANTS AS *AMICI CURIAE* SUPPORTING APPELLANTS

This brief is submitted on behalf of certain individual and organizational plaintiffs who have filed suit challenging the constitutionality of North Carolina's 2011 legislative and congressional redistricting plans as *amici curiae* in support of appellants.[1]

INTEREST OF *AMICI CURIAE*

Amici are residents of North Carolina and nonprofit organizations that focus on protecting voting rights and promoting voter participation in North Carolina. *Amici* are all plaintiffs in litigation currently pending in North Carolina that alleges that various districts in the state's 2011 legislative and congressional redistricting plans were drawn pursuant to racial targets that unconstitutionally classified citizens for voting purposes based on their race. The cases, which also raise state constitutional claims, were consolidated and currently are pending in the North Carolina Supreme Court. *Dickson v. Rucho,* and *NAACP v. State of North Carolina,* No. 201PA12-2.

Amici include white and black voters who live in the racially gerrymandered election districts challenged in the North Carolina litigation. One of those voters is Robinson O. Everett, Jr., who was a

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[1] The parties have consented to the filing of amicus curiae briefs in support of either party and have so informed the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

plaintiff in *Shaw v. Reno*, 509 U.S. 630 (1993). Organizational *amici* include the North Carolina State Conference of Branches of the NAACP, the North Carolina A. Philip Randolph Institute, Democracy North Carolina, the League of Women Voters of North Carolina -- all organizations that participated in the redistricting process in 2011.

Over the past few decades, *amici* have worked together to reach across racial lines in North Carolina and forge alliances that are based not on the color of voters' skin but on the voters' common interests in the important issues of the day. They have a strong interest in ensuring that this progress is not frustrated by a profound misapplication of existing equal protection doctrine and a mistaken understanding of this Court's rulings interpreting the Voting Rights Act. The lower court in the instant case wrongly endorsed the Alabama Legislature's belief that compliance with the Voting Rights Act required it to draw a racially proportionate number of majority-black districts with a specific percentage of black voting age population and thereby failed to properly follow the lessons of *Shaw v. Reno* and its progeny. The North Carolina 2011 redistricting process was similarly flawed, and *amici* can illuminate the impact of this error as applied to other jurisdictions.

SUMMARY OF THE ARGUMENT

Amici urge reversal of the court below because the Alabama Legislature's use of racial targets in drawing new redistricting plans following the 2011 census was an explicit racial classification that was not justified by a compelling governmental interest and was not narrowly tailored. This Court

reiterated in *Bartlett v. Strickland* the well-established principle that the "'moral imperative of racial neutrality is the driving force of the Equal Protection Clause,' and racial classifications are permitted only 'as a last resort.'" 556 U.S. 1, 21 (2009) (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 518-19 (1989)). The Court further cautioned that "[o]ur holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns." *Bartlett*, 556 U.S. at 23-24 (citing *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1992)).

The North Carolina legislature, like the Alabama legislature, misapplied these principles in the 2011 redistricting by imposing a racial proportionality target for the number of majority-black districts and requiring every district to meet a specific black population percentage target. As in Alabama, the North Carolina General Assembly believed that these fixed racial targets were required by the Voting Rights Act.

As a result of these racial targets, the North Carolina legislature enacted nine state senate districts as majority-black districts where previously none of the state's senate districts were majority-black.[2] They enacted twenty-three majority-black

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[2] Although there were no majority-black state senate districts, in June of 2011 there were seven African-Americans serving in the North Carolina State Senate. Joint Statement by Senator Bob Rucho, Chair of the Senate Redistricting Committee, and Representative David Lewis, Chair of the House Redistricting Committee 3 (June 17, 2011), http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%2

state house districts where previously only ten of those districts were majority-black.[3] Finally, they enacted two majority-black congressional districts where previously there were none, increasing the percentage of black voting age population in North Carolina's 12th Congressional District from 42.31% to 50.66%.[4] The General Assembly abandoned traditional redistricting criteria such as geographic compactness and respect for subdivision boundaries in the quest to reach the desired fixed racial targets.

Ignoring decades of progress in increasing opportunities for black voters to participate in the political process, in 2011 the General Assembly

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0Representative%20David%20Lewis_6.17.11.pdf. In Senate Districts 3 and 32, the candidates of choice of black voters were white candidates and were elected in 2008 and 2010. *Dickson v. Rucho*, No. 201PA12-2, Rule 9(d) Documentary Exhibits 7072 (Sept. 4, 2013).

[3] Although there were only ten majority-black state house districts, in June of 2011 there were eighteen African-American members serving in the North Carolina House of Representatives. Joint Statement, *supra* note 2, at 3. In House Districts 8 and 27, both of which were majority-black in voting age population, the candidate of choice of black voters was a white candidate who was elected in 2006, 2008, and 2010. *Dickson v. Rucho*, No. 201PA12-2, Rule 9(d) Documentary Exhibits 7071 (Sept. 4, 2013).

[4] In June of 2011 there were two African-Americans serving in Congress from North Carolina's 1st and 12th Congressional Districts. Statement by Senator Bob Rucho and Representative David Lewis Regarding the Proposed 2011 Congressional Plan 3 (July 1, 2011), http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_7.1.11.pdf.

created more majority-black districts than ever before, thereby entrenching racial stereotypes and tearing apart effective cross-racial coalitions that had evolved over time. *Cf. Alabama Legislative Black Caucus v. State of Alabama*, 989 F. Supp. 2d 1227, 2013 U.S. Dist. LEXIS 178735 at *327 (M.D. Ala. 2013) (Thompson, J. dissenting) ("The purpose of [the VRA] is to help minority groups achieve equality, not to lock them into legislative ghettos."). The General Assembly's use of racial targets in redistricting was justified only by the mistaken belief that they were required by federal law. In addition to North Carolina and Alabama, there is only one other redistricting case, currently pending in Virginia, in which it is alleged that the Legislature admittedly and explicitly used racial targets in drawing districts.

Thus, what is needed here is not a revision of voting rights jurisprudence; nor will reversal of the trial court result in significant upheaval of redistricting maps throughout jurisdictions formerly covered by Section 5 of the Voting Rights Act. Rather, the misinterpretation of the Voting Rights Act's requirements resulting in the unfair imposition of racial targets in redistricting in a few states is an unconstitutional use of race that must be corrected.

ARGUMENT

I. THE VOTING RIGHTS ACT AND EQUAL PROTECTION GUARANTEES WERE WORKING IN NORTH CAROLINA TO AMELIORATE THE EFFECTS OF PAST DISCRIMINATION IN VOTING

In the twenty-eight years since this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the twenty-one years since the Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), voters in North Carolina have made significant progress towards achieving the goals of inclusion and fair representation embodied in the Voting Rights Act. The increasing willingness of white voters to support black candidates at the ballot box has meant that when black voters go to the polls, they have a reasonable chance of electing their candidates of choice even when those candidates are black and even if black voters are not a majority of the electorate. Indeed, in 2011 the record developed by the General Assembly showed that fifty-six times between 2006 and 2011, African-American candidates won election to the state house and senate from districts that were not majority-black, and twenty-two times those candidates were running in majority-white districts. Most of these elections involved candidates of different races, where the victorious black candidate defeated a white challenger, and in some notable cases, that white challenger was the incumbent.

When the North Carolina legislature was drawing Congressional districts following the 1990 Census, there had not been an African-American elected to Congress from North Carolina since 1896,

when George H. White was re-elected for his second and last term. When drawing Congressional Districts in 2011, three different African-Americans had been elected to represent North Carolina's rural coastal plain, and Representative Mel Watt had won seven of ten elections in urban districts that were majority white, including a strongly contested election in 1998 in which his opponent raised over a million dollars and the district was only 32% black in voting age population.[5]

However, the redistricting plans enacted by the General Assembly in 2011 unreasonably take no account of any of the important political progress that has been made in North Carolina. Instead of continuing the gradual transition to a system without racial roadblocks, they set a clear course in exactly the other direction, re-entrenching racial divisions in the political process.

The North Carolina Legislature explicitly imposed two racial targets: 1) The percentage of majority-black districts in each plan must equal the statewide black population percentage (a racial proportionality requirement that was so fixed it might reasonably be called a quota) and 2) Each majority-black district must be over 50% black in voting age population (a minimum black population percentage requirement). Employing these racial targets led the legislature to create nine state senate districts as majority-black districts where previously none of the state's senate districts were majority-black; and twenty-three majority-black state house

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[5] *Dickson v. Rucho*, No. 201PA12-2, Transcript of Proceedings 177-78 (June 4, 2013).

districts where previously only ten of those districts were majority-black. In the congressional plan, the General Assembly enacted two majority-black congressional districts where previously there were none. The districts challenged in *amici*'s litigation as being racially gerrymandered were drawn, with only one exception, with a higher black voting age population percentage than the previous decade. As in Alabama, compliance with the Voting Rights Act was the North Carolina Legislature's only justification for employing these racial targets.

A. The Impact Of Compliance With The Voting Rights Act And Equal Protection Doctrine In North Carolina Before 2011.

North Carolina has an extensive history of official discrimination against African-Americans in voting, as documented by this Court's cases from *Gingles* to *Shaw*. *See, e.g., Gingles v. Edmisten*, 590 F. Supp. 345, 359-61 (E.D.N.C. 1984), *aff'd in part and rev'd in part by Thornburg v. Gingles*, 478 U.S. 30 (1986). In 1982, African-American voters were registered statewide at percentages that lagged behind white voters by fourteen percentage points, and as much as twenty-three percentage points in some counties. 590 F. Supp. at 360. In 1981, the General Assembly enacted a legislative redistricting plan that had no majority-black single-member districts.[6] Following the *Gingles* litigation, the General Assembly enacted

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[6] Research Division, N.C. General Assembly, *Legislator's Guide to North Carolina Legislative and Congressional Redistricting* 20 (March 2011), *available at* http://www.ncleg.net/GIS/Download/Maps_Reports/2011RedistrictingGuide.pdf.

a plan creating ten majority-black single-member districts and one majority-black two-member district for the state house; and three majority-black senate districts.[7] Between 1990 and 2010, the number of majority-black districts for each body decreased by three, while the number of African-American legislators in the General Assembly steadily increased from 18 to 25 in that same period.[8] The following charts show the number of House and Senate Districts where the total black voting age population was greater than 50% from 1992 to the present:[9]

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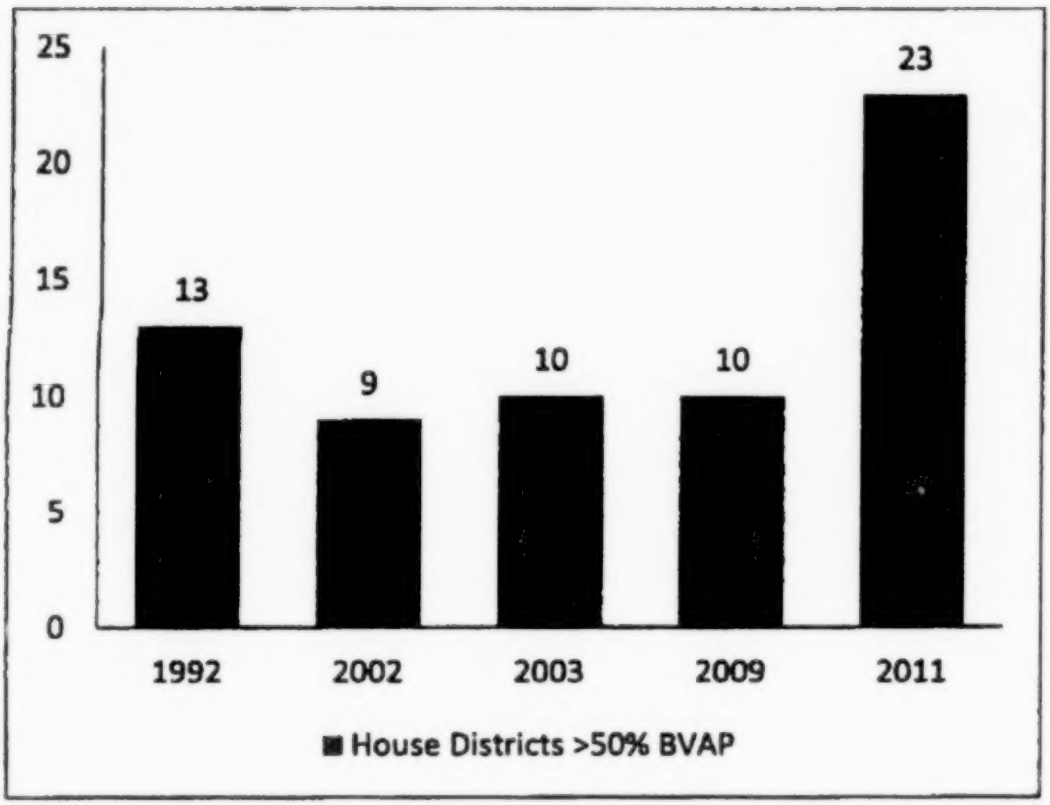
[7] *Id.* at 28.

[8] *See* Joint Statement, *supra* note 2, at 3; Keech and Sistrom, North Carolina, in Davidson and Grofman, eds., QUIET REVOLUTION IN THE SOUTH, THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, 166 (1994); *Dickson v. Rucho*, No. 201PA12-2, Transcript of Proceedings 32-35 (June 4, 2013).

[9] Compiled from plan statistics contained in "Redistricting Archives" and "2011 Redistricting Process," *available at* http://www.ncleg.net/representation/redistricting.aspx.


25
20
15
10
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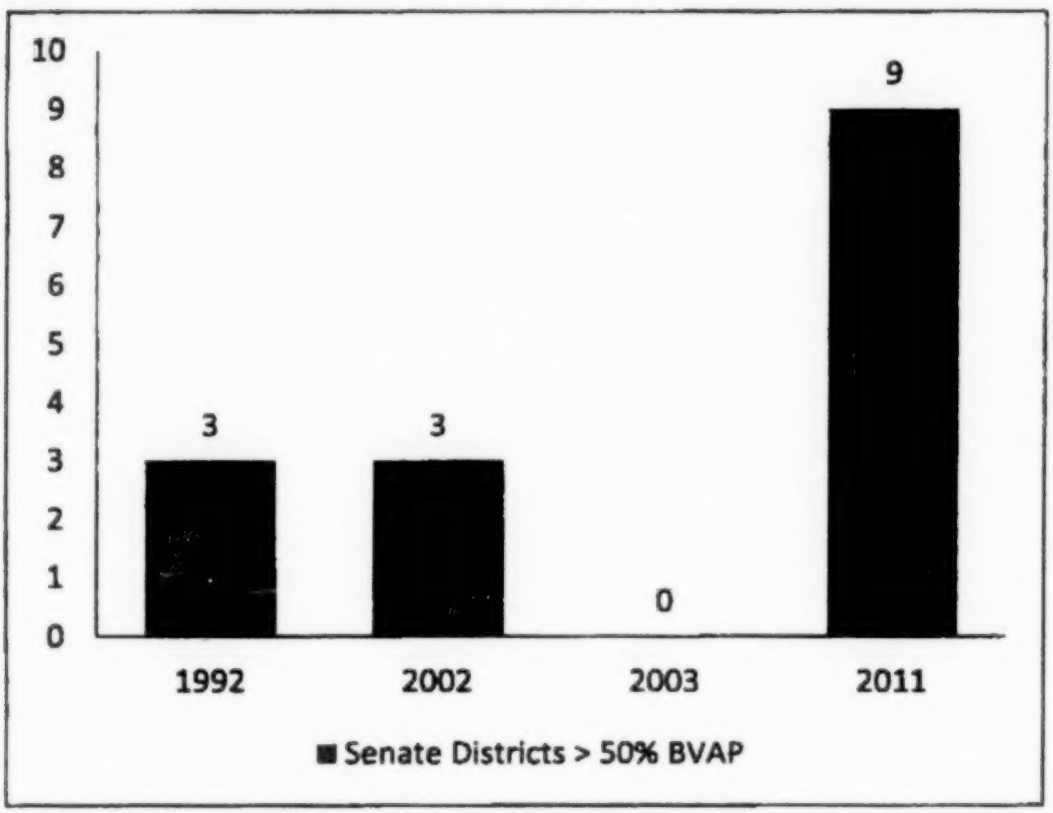
0
13
9
10
10
23
1992
2002
2003
2009
2011
House Districts >50% BVAP


10
9
8
7
6
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2
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1992
2002
2003
2011
Senate Districts > 50% BVAP

The decline in the number of majority-black districts was accompanied by increases in the number of African-American legislators and voter registration by black voters. By the time the legislature was redrawing districts in 2011, levels of black voter registration had increased over what they were in 1982.[10]

The progress made in North Carolina is further demonstrated by the fact that between 2006 and 2011, black candidates won fifty-six election contests for state legislative seats in districts that were not majority-black, and twenty-two times in majority-white districts.[11] This pattern of sustained success for black voters over repeated election cycles is precisely what this Court previously found to be inconsistent with an allegation that the ability of black voters "is not equal to that enjoyed by the white majority." *Gingles*, 478 U.S. at 77.

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[10] In November 2010, 88.22% of the white voting age population was registered to vote while 89.75% of black voting age population in the state was registered to vote. *See* North Carolina State Board of Elections, N.C. Voter Statistics Results, (Dec. 25, 2010), *available at* http://www.ncsbe.gov/webapps/voter_stats/results.aspx?date=12-25-2010 *and* U.S. Census Bureau, Race, Hispanic or Latino, Age, and Housing Occupancy: 2010 Census Redistricting Data (Public Law 94-171) Summary File, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_PL_QTPL&prodType=table. *See also, Dickson v. Rucho*, No. 201PA12-2, Transcript of Proceedings 384 (June 5, 2013) (expert testimony concerning African-American participation rates in North Carolina).

[11] *Dickson v. Rucho*, No. 201PA12-2, Plaintiff-Appellants'Brief, Appx. 6 (Oct. 11, 2013).

For the Congressional districts, the same pattern of progress was apparent. Congressional Districts 1 and 12 previously were less than 50% black in voting age population and both districts had elected candidates of choice of black voters in the primary and general elections since 1992.[12] In fact, the enacted plans increased the percentage of black voting age population in North Carolina's 12th Congressional District from 42.31% to 50.66%, which is higher than the 32.56% black voting age population district that was used for the 1998 election cycle,[13] and the 43.36% black voting age population district that was used in the 2000 election cycle.[14]

In the most recent election cycles in all state legislative and congressional districts, the candidate of choice of black voters prevailed in 28 of 31 districts with 40%+ black voting age population, for a win rate of 90%.[15] This win rate is no different

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[12] *Dickson v. Rucho*, No. 201PA12-2, Rule 9(d) Documentary Exhibits 7617, 7627 (Sept. 4, 2013).

[13] Redistricting Archives, 1998 Congressional Plan A, *available at* http://www.ncleg.net/GIS/Download/District_Plans/DB_1991/Congress/1998_Congressional_Plan_A/Reports/StatewideByDistrict/rptVap.pdf.

[14] Redistricting Archives, 97 House Plan A, *available at* http://www.ncleg.net/GIS/Download/District_Plans/DB_1991/Congress/97_House-Senate_Plan_A/Reports/StatewideByDistrict/rptVap.pdf.

[15] *Dickson v. Rucho*, No. 201PA12-2, Rule 9(d) Documentary Exhibits 962 (Sept. 4, 2013).

than the win rate for black and white candidates of choice of African-American voters in districts that are 50%+ in black voting age population.[16] Since 1986, Section 2 of the Voting Rights Act opened the doors of the state legislature to candidates of choice of African-American voters in an evolving process. *See also* Keech & Sistrom, *supra* note 8, at 155 (noting impact of VRA in increasing black participation and making possible the election of black candidates to public office).

African-American candidates winning in districts ranging from 21% to 41% black in voting age population illustrate that candidates of choice of black voters have built successful multi-racial campaigns. Examples include Dan Blue's ascent to the position of Speaker of the House in 1991, Ralph Campbell's statewide election as State Auditor in 2004, Malcolm Graham's defeat of the well-regarded white-incumbent Fountain Odom in 2006, and Dr. Eric Mansfield's election to the Senate from Fayetteville in 2010. They garnered strong support from black and white voters alike, and achieved winning margins in contested elections as high as 70 to 80% of the vote. Black and white voters have seen their common interests united behind the values they share, and they have seen their elected leaders, honorable and capable men and women of color, ably represent black and white voters together.

Indeed, the record in North Carolina illustrates very well Justice Souter's insight that:

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[16] *Id.* at 1302-03.

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Johnson v. De Grandy, 512 U.S. 997, 1020 (1994). While racially polarized voting has not disappeared from North Carolina elections since *De Grandy*, it has lessened to the degree that candidates of choice of black voters can be successful in some areas of the state without majority-black districts. It is that pattern of success that the North Carolina General Assembly needed to take into account, but disregarded when drawing its 2011 redistricting plans.

B. The Use Of Explicit Racial Targets In 2011 Was A Departure From North Carolina's Recent Progress.

The use of racial targets in the 2011 round of redistricting in North Carolina was a dramatic

departure from earlier applications of federal voting rights law in redistricting. They started the process of drawing new plans by establishing a fixed racial target: given that blacks are 21.2% of the state's voting age population, to achieve racial proportionality, approximately 10 of the state's 50 senate districts should be majority-black districts and approximately 24 of the state's 120 house districts should be majority-black districts.[17] The racial proportionality goal was implemented without any reference to the extent to which candidates of choice of black voters were elected to state house and state senate districts in various parts of the state, and without any reference to the extent of racially polarized voting throughout the state.[18] Instead, the goal of substantial proportionality was adopted in order to "expedite the preclearance of each plan pursuant to Section 5 of the Voting Rights Act," and to "further the State's obligation to comply with Section 2 of the Voting Rights Act." Joint Statement, *supra* note 2, at 3.

In addition, the legislators believed that any "Voting Rights Act District" drawn to comply with Section 5 of the Voting Rights Act must also comply with *Bartlett v. Strickland,* 556 U.S. 1 (2009), a case interpreting Section 2 of the Voting Rights Act, by being over 50% black in voting age population. They interpreted *Bartlett* to "require that districts drawn to insulate the State from liability under the Voting

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[17] *Dickson v. Rucho,* No. 201PA12-2, Rule 9(d) Documentary Exhibits 7376 (Sept. 4, 2013).

[18] *Dickson v. Rucho,* No. 201PA12-2, Record on Appeal 1041-43 (Sept. 4, 2013).

Rights Act must be drawn with a black voting age population in excess of 50% plus one." Statement by Senator Bob Rucho and Representative David Lewis Regarding Proposed State Legislative Redistricting Plans, 4 (July 12, 2011).[19]

The chairmen of the redistricting committees, Senator Rucho and Representative Lewis, testified that they provided two instructions to their chief architect, the consultant hired to draw districts: 1) draw a majority-black district wherever possible so that black voters are at least a majority of the voting age population in the district and 2) draw sufficient majority-black districts to provide North Carolina's black voters with a substantially proportional opportunity to elect their candidates of choice.[20] These two instructions were identified as the criteria that any plan submitted to the General Assembly must meet. In a public statement issued June 22, 2011, Rucho and Lewis unambiguously stated that they would entertain other redistricting maps "provided the total districts proposed provide black voters with a substantially proportional statewide opportunity to elect candidates of their choice. Moreover, any such districts must comply with *Bartlett v. Strickland*, and be drawn at a level that constitutes a true majority of black voting age population." Statement by Sen. Bob Rucho and Rep.

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[19] *Available at* http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_7-12-11.pdf.

[20] *Dickson v. Rucho*, No. 201PA12-2, Record on Appeal 1038-43 (Sept. 4, 2013).

David Lewis Regarding Proposed VRA Districts, 7 (June 22, 2011).[21] Later, Rucho and Lewis explained their rejection of alternative plans that were submitted to them by a citizen group on the grounds that those plans did not meet their racial targets.[22]

In fact, with only one exception in the House plan, all of the districts challenged by *amici* collectively as racially gerrymandered by packing were drawn at or above the black population percentage they had before being redrawn, using 2010 census data. This is in stark contrast to the General Assembly's redistricting plans enacted following the 2000 Census, when, as the Appellants point out, nearly all of North Carolina's House and Senate districts had lower black population percentages than the prior districts and the 2003 plans were precleared by the Department of Justice. *See* Brief of Appellants, No. 13-1138, at 29 (Aug. 13, 2014).

The following charts compare the percentage black voting age population in 1) individual districts challenged by *amici* as racially gerrymandered districts; and 2) the "benchmark" or prior districts.[23]

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[21] *Available at* http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_6.22.11.pdf.

[22] Statement, *supra* note 19, at 4-5.

[23] *Dickson v. Rucho*, No. 201PA12-2 Rule 9(d) Documentary Exhibits 1205 & 1207 (Sept. 4, 2013).

[illegible]	[illegible]	[illegible]	[illegible]
5	48.87%	54.17%	5.29%
7	60.77%	50.67%	-10.10%
12	46.45%	50.60%	4.15%
21	46.25%	51.90%	5.65%
24	50.23%	57.33%	7.11%
29	39.99%	51.34%	11.35%
31	47.23%	51.81%	4.58%
32	35.88%	50.45%	14.57%
33	51.74%	51.42%	-0.32%
38	27.96%	51.37%	23.41%
42	47.94%	52.56%	4.62%
48	45.56%	51.27%	5.71%
57	29.93%	50.69%	20.76%
99	41.26%	54.65%	13.38%
102	42.74%	53.53%	10.79%
106	28.16%	51.12%	22.96%
107	47.14%	52.52%	5.38%

[illegible]	[illegible]	[illegible]	[illegible]
4	49.70%	53.33%	3.63%
5	30.99%	51.97%	20.98%
14	42.62%	51.28%	8.66%
20	44.64%	51.04%	6.40%
21	44.93%	51.53%	6.60%
28	47.20%	56.49%	9.30%
38	46.97%	52.51%	5.53%
40	35.43%	51.84%	16.40%

The racial proportionality and black population percentage targets employed by the Legislature led them to enact majority-black voting age population districts nearly everywhere possible. In making their redistricting plans public, Rucho and Lewis explained:

> [W]e see no principled legal reason not to draw all VRA districts at the 50% or above level when it is possible to do so. Now that it is apparent that these majority black districts can be drawn, any decision to draw a few selected districts at less than a majority level could be used as evidence of purposeful discrimination or in support of claims against the State filed under Section 2. Thus, in order to best protect the State from costly and unnecessary litigation, we have a legal obligation to draw these districts at true majority levels.

July 12, 2011 Statement at 5. Citing *Johnson v. Degrandy*, 512 U.S. 997 (1994), Rucho and Lewis' statement goes on to assert that providing proportional representation using the racial proportionality target will give the state "an important defense" to any lawsuit that might be filed under Section 2 of the Voting Rights Act. *Id.*

The degree to which adherence to the racial proportionality target led the Legislature to ignore current conditions is best illustrated by the fact that the enacted plans create new majority-black districts in Durham County where, as early as 1986, this Court held that no Section 2 violation occurred because white voters were voting for, and helping to

elect, candidates of choice of black voters. *See Gingles*, 478 U.S. at 77.

Similar to Durham County, the 2011 plan included two majority-black senate districts in Mecklenburg County where previously African-Americans were being elected to the Senate in majority-white districts. The Senate plan added a new majority-black senate district in eleven counties for the first time.[24] In Wake County, where there had never been a majority-black senate district and no majority-black house district since 2002, Linda Coleman, an African-American, won election in 2006 and 2008 in a house district that was 26.70% black in voting age population.[25] Similar patterns are true for the State House districts.[26] Throughout the state, the use of racial proportionality and black population percentage targets led to highly irregular district lines that split counties and precincts, and divided voters from one another on the basis of their race, block by block.

II. ONLY A FEW STATES USED EXPLICIT RACIAL TARGETS WITHOUT REGARD TO CURRENT CONDITIONS IN REDISTRICTING FOLLOWING THE 2010 CENSUS

Reversing the court below in this case will not result in substantial changes to election districts

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[24] *Id.* at 1205.

[25] *Dickson v. Rucho*, No. 201PA12-2, Plaintiff-Appellants' Brief, Appx. 6 (Oct. 11, 2013).

[26] *Id.*

around the country because there are only a few cases currently in litigation where it is alleged that racial targets were used in redistricting. In addition to litigation in North Carolina brought by *amici*,[27] there is a case pending in Virginia alleging that the Virginia General Assembly made the same error regarding the requirements of Section 5 of the Voting Rights Act. *See Page v. Virginia State Bd. of Elections*, No. 3:13-cv-678 (E.D. Va. filed Oct. 2, 2013).[28] In that case, legislators testified that they started with a 55% target in drawing Virginia's Congressional District 3, and ultimately increased the black VAP in that district from 53.9% in the existing plan to 57.2% in the enacted plan.[29] As in North Carolina and Alabama, they believed the 55% black voting age population target was required by the Voting Rights Act, without examining recent election data.[30]

There is also litigation pending in Florida raising federal constitutional claims concerning that state's congressional redistricting plan. *See Warinner v. Detzner*, No. 14-164 (N.D. Fla. filed Mar. 27, 2014).

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[27] An entirely different set of plaintiffs have brought similar racial gerrymander claims against North Carolina's 1st and 12th congressional districts in federal court. *See Harris v. McCrory*, No. 1:13-cv-949 (M.D.N.C. filed Oct. 24, 2013).

[28] To date there has been no final ruling from the trial court in this case.

[29] *Page v. Virginia State Bd. of Elections*, No. 3:13-cv-678, Plaintiffs' Post-Trial Brief 5-9 (E.D. Va June 6, 2014), ECF No. 105.

[30] *Id.*

In *Warinner,* the Plaintiffs' amended complaint alleges that Florida's Congressional District 5 is racially gerrymandered because the black voting age population of the district was increased from 49.9% to 50.1% without a proper functional analysis of minority voting rights.[31] However, the *Warinner* case will be impacted by the fact that Congressional District 5 is in the process of being redrawn to remedy state constitutional violations found to exist on other grounds. *See Romo v. Detzner*, Nos. 2012-CA-00412 & 2012-CA-00490 (Fla. 2d Jud. Cir. Ct. July 10, 2014).

In the post-2010 round of redistricting, there were several other cases raising claims of racial gerrymandering in state legislative or congressional redistricting that have been resolved. None of these cases included admissions by legislators that they interpreted the Voting Rights Act to require explicit racial targets, that is, a specific number of majority-black districts at a certain percentage black voting age population level, without examining current conditions. *See, e.g., Backus v. South Carolina,* 857 F. Supp. 2d 553, 564 (D.S.C.) (three-judge court) *aff'd, Backus v. South Carolina,* 133 S. Ct. 156 (2012) (testimony by one legislator that map drawers "relied on predetermined demographic percentages" but court finds that was not a general motivation of the legislature and that race was just one consideration among many); *Radogno v. Ill. State Bd. of Elections,* 836 F. Supp. 2d 759 (N.D. Ill. 2011) (three-judge court), *aff'd,* 133 S. Ct. 103 (2012) (no

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[31] *Warinner v. Detzner,* No. 13-1860, First Amended Complaint, 5-6, Jan. 16, 2014, ECF No. 22.

racial gerrymander claim against district that was 25% black in voting age population); *Comm. For a Fair and Balanced Map v. Ill. State Bd. of Elections,* 835 F. Supp. 2d 563 (N.D. Ill. 2011) (three-judge court) (partisan, not racial considerations, dominated map, no use of race-based targets for districts); *Fletcher v. Lamone,* 831 F. Supp. 2d 887 (D. Md. 2011) (three-judge court) *aff'd*, 133 S. Ct. 29 (2012) (no evidence that race predominated, no allegations of packing or use of racial targets); *Jeffers v. Beebe,* 895 F. Supp. 2d 920 (E.D. Ark. 2012) (no evidence of racial animus, no allegations of racial targets).

Of these cases, only *Backus v. South Carolina* involved a jurisdiction that was covered by Section 5 of the Voting Rights Act in 2011, and in South Carolina, compliance with Section 5 was not interpreted by the legislature to require the same percentage black voting age population or the same number of majority-black districts as before. For example, State Senate District 7 provided black voters with the ability to elect their candidate of choice, an African-American Senator named Ralph Anderson.[32] Mr. Anderson defeated two non-African-American candidates in the 2008 general

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[32] *See* Senate Preclearance Submission - S. 815, South Carolina Senate Judiciary Committee, *available at* http://redistricting.scsenate.gov/PreclearanceSubmissionsS815.html; and Exhibit – 14, Report by Richard Engstrom, Ph.D., South Carolina Senate Judiciary Committee, *available at:* http://redistricting.scsenate.gov/Exhibits/Exhibit%2014%20%20REPORT%20BY%20RICHARD%20ENGSTROM,%20PHD/Exhibit%2014%20%20Report%20by%20Richard%20Engstrom%20PhD.pdf.

election, winning with 70.1% of the vote.[33] The benchmark district had a 46.1% BVAP, and the 2011 enacted plan had a 43.3% BVAP. The candidate of choice of black voters was winning white votes in the district, and that district did not need to be packed with additional black voters to satisfy Section 5 of the Voting Rights Act.[34]

Indeed, across the whole South Carolina redistricting plan, in three out of the four districts that elected the candidate of choice of black voters despite being under 50% BVAP in the benchmark plan, South Carolina did not increase the black population percentage of the district to 50% BVAP. The fourth district involved only a 1.1% increase in the BVAP. Moreover, the state actually lowered the BVAP percentage in seven out of the twelve districts that elected the candidates of choice of black voters. The South Carolina Legislature did not employ racial targets in its redistricting process.

Thus, the Alabama Legislature's mis-interpretation of the Voting Rights Act to require specific racial targets was not a widespread or common interpretation, but it did occur in North Carolina and Virginia. This Court's correction of that error in this case ultimately will assist those states to redraw their districts in a way that does

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[33] *Id.*

[34] The Department of Justice precleared the South Carolina State Senate Plan on November 14, 2011. Status of Statewide Redistricting Plans, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last accessed December 18, 2012).

not involve the excessive and mechanical use of race-based targets.

III. WHILE REDISTRICTING IS PRIMARILY THE RESPONSIBILITY OF LEGISLATURES, THE COURT MUST ACT WHEN DISTRICTS ARE BASED ON EXPLICIT RACIAL CLASSIFICATIONS

Asking this Court to enforce the constitutional equal protection guarantees that guard against unjustified race-based decision-making by a legislature is not "punishing" the state that is striving in good faith to comply with the Voting Rights Act, as the lower court in this case believed. *Alabama Legislative Black Caucus v. State of Alabama,* 989 F. Supp. 2d 1227, 2013 U.S. Dist. LEXIS 178735 at *230 (M.D. Ala. 2013). Rather, it is correcting a misunderstanding of governing legal standards that led to the imposition of racial targets in redistricting that were never intended by Congress. The crucial error made by the North Carolina General Assembly, and by the Alabama Legislature, was to conclude that the Voting Rights Act creates a requirement for majority-black districts without regard to recent progress in ameliorating the impact of racially polarized voting.

Instead, the task the North Carolina General Assembly faced when drawing new legislative and congressional districts was to assess where white bloc voting exists at levels high enough usually to defeat the candidate of choice of black voters. *Bartlett,* 556 U.S. at 24. In other words, majority-black districts are only necessary, as a temporary and remedial measure, after a searching inquiry revealing that black voters are consistently shut out

of the political process and a majority-black district is the only way black voters will have a fair opportunity to elect their candidates of choice. Whether under the Section 5 non-retrogression standard, or the Section 2 vote dilution standard, a deep and searching local inquiry of current practical realities has always been required. *See, e.g, Shelby Cnty. v. Holder,* 133 S. Ct. 2612, 2629 (2013) (VRA must be tied to current conditions); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006) (vote dilution inquiry requires an "intensely local appraisal"); *Miller v. Johnson,* 515 U.S. 900, 922 (1995) (majority-black districts drawn to satisfy Section 5 of the VRA require strong basis in evidence of the harm being remedied); *Johnson v. DeGrandy,* 512 U.S. at 1000; *Gingles,* 478 U.S. at 45 ("the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process."). Where race-based targets are employed without regard to current conditions, the courts must intervene to guarantee the constitutional right of voters to equal protection of the laws.

CONCLUSION

For the reasons articulated above, and in order to continue the important progress that the Voting Rights Act was intended to foster, *amici* respectfully request that the Court reverse the judgment below.

Respectfully submitted,

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DANIELLE GRAY
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AMICUS CURIAE BRIEF

Nos. 13-895 and 13-1138

In The Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *ET AL.*,
Appellants,

v.

ALABAMA, *ET AL.*,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *ET AL.*,
Appellants,

v.

ALABAMA, *ET AL.*,
Appellees.

On Appeal from the
United States District Court
for the Middle District of Alabama

BRIEF OF *AMICUS CURIAE* DALTON J. OLDHAM IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

For the past 25 years, Dalton L. Oldham has represented individuals and several state and local governments in redistricting cases, both in defending state redistricting maps and in challenging redistricting maps. Mr. Oldham has spoken at numerous seminars and symposiums on redistricting, census and election law issues, National Conference of State Legislatures and American Bar Association. Mr. Oldham presented a paper at the Convention of the ABA on census adjustment and its potential effect on redistricting which was published together with other symposium papers in a volume titled: CENSUS 2000: CONSIDERATIONS AND STRATEGIES FOR STATE AND LOCAL GOVERNMENT (2000), Benjamin E. Griffith, (ed.). Mr. Oldham respectfully submits this brief in the hopes that his experience may elucidate some of the important issues raised by the parties.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or his counsel made a monetary contribution toward its preparation or submission. Counsel for the parties granted general consent to the filing of amicus briefs on July 10, 2014 and August 15, 2014 (No. 13-895) and July 10, 2014 and August 5, 2014 (No. 13-1138).

SUMMARY OF THE ARGUMENT

Appellants in this case propose a new legal standard for Section 2 of the Voting Rights Act. This legal standard would pervert the Voting Rights Act from a statute intended to allow minorities to have an equal opportunity to elect candidates of their choice, into a statute that requires the absolute maximization of minority voting strength through both the creation of majority-minority districts and a maximization of influence districts. This standard would essentially require that all jurisdictions intentionally gerrymander for the maximum benefit of the political party generally supported by the minority in question. Such a standard would be a radical departure from all previous legitimate redistricting practices. It comports with neither the text nor intent of the statute, nor this Court's prior precedent regarding the Voting Rights Act and, if it did, it would not comply with the United States Constitution.

Regardless of how the Court may ultimately decide this case, it is absolutely imperative that the Court make clear that it is in no way adopting or validating the new standard proposed by the Appellants in this case.

ARGUMENT

I. HOW APPELLANTS' NEW STANDARD WOULD OPERATE IN ALABAMA AND OTHER JURISDICTIONS

Appellants' new standard suggests that the Voting Rights Act requires that a jurisdiction when faced with redistricting majority-minority districts or districts that have significant minority components, i.e. minority influence districts, the jurisdiction is required by the Voting Rights Act to only place the minimum amount population in the districts as is necessary to bring the districts above -5% of the ideal district population. Alabama Legislative Black Caucus Brief at 6. Alabama Democratic Conference Brief at i. [2]

Furthermore the Appellants suggest that a jurisdiction is required to engage in extensive study to determine the minimum percentage necessary to elect a minority candidate of choice in a majority-minority district.

Fundamentally, Appellants' new standard is that the Voting Rights Act requires a jurisdiction to

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[2] *See also* Alabama Legislative Black Caucus brief at 15 27, 34, 45 and 9 n. 22. As well as the overall deviations of the alternative redistricting schemes proposed in the legislature by members of the Black Caucus *infra*. *See also* Alabama Democratic Conference Brief at i "this goal, particularly when combined with the new goal of significantly reducing population deviation among districts, led the state to stark racial intentionality in district drawing...". *See also* 16.

provide proportional or near proportional representation for minorities in a jurisdiction with the minimum minority population necessary to elect these preferred candidates of the minority communities choice.[3] This minimum minority population is to be achieved by both intentionally underpopulating the minority districts and by placing the minimum minority population percentage in those districts necessary to elect the preferred candidate of choice. This of course produces a substantial minority population which appellants propose must be used to maximize minorities influence in other districts.[4]

These influence districts would likewise be intentionally underpopulated. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga., 2004) (three-judge court) (sum. aff. *Cox v. Larios*, 542 U.S. 947 (2004)) is a crucial case because the facts before the district court in that case illustrated the actual power that population deviations under 10% can have if the population deviations can be manipulated to consistently provide an advantage to a specific group. A hypothetical is illustrative of the potential for mischief such a rule would create.

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[3] *See* Appellants' Alabama Legislative Black Caucus Brief at 61. *See also* Alabama Democratic Conference Brief at 10, 14, 32 -36

[4] Alabama Democratic Conference Brief at 2, 17-19, 33. *See also* Appellants' Alabama Legislative Black Caucus Brief at 9 which lists 8 influence districts (2 Senate, 6 House) "eliminated" by the state's redistricting plan. These districts had replacement versions in the Black Caucus' legislative alternatives listed infra.

Imagine a jurisdiction with 100,000 population and 100 districts with a 25% minority population. Theoretically you could evenly divide the districts between the majority population in the minority population by creating 75 districts of a thousand people each for the majority and 25 districts of a thousand people each for the minority. If you underpopulated the minority districts by 5%, each district would be composed of only 950 people, leaving 50 extra persons for each of the 25 districts requiring that the drafters of the map to locate the 1,250 extra minority voters to place in other districts. If the drafters so desired, under the theoretical 10% safe harbor, the drafters could underpopulate two more majority districts and place half of the 1250 extra minority voters in each of these two new underpopulated districts and have two 65% plus majority-minority districts. This extra population could also be placed in four or five so-called influence districts where, with a few allies, the minorities could elect candidates who are not the minority communities preferred choice and are not supported by the majority of the jurisdiction, but are of the same political party. This is why population deviation patterns, even when they are below 10%, matter. If you lower the minority percentage in each majority-minority district it has a similar effect. When this is done in the real world the geographic locations of the population prevent the kind of perfect homogeneous districts that were used above in order to keep the math simple and illustrate the point. However, this also means that in the real world there will be a significant minority population in many districts before any manipulation of deviation or population percentages takes place and

therefore more marginal manipulations can have far more material effects. When the two strategies are combined, as Appellants proposes here, then it is quite possible for a minority with only a few allies, that constitute far less than 50% of the voters, to control an elective body despite huge majorities voting against it.[5]

As the Alabama Legislative Black Caucus claims in its brief the:

> 2010 census revealed that the majority black districts were all underpopulated... the majority black senate districts on average were underpopulated by about 15% and the average majority black house district was underpopulated by about 16%.[6] The

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[5] This is exactly the racially driven deviation pattern employed by the Arizona Independent Redistricting Commission in Harris. *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014) (appeal docketed at *Harris v. Ariz. Indep. Redistricting Comm'n*, No. 14-232 (Aug. 28, 2014)

[6] *See Rodriguez v. Pataki*, 308 F.Supp.2d 346, (S.D.N.Y. 2004) (sum. aff. *Rodriguez v. Pataki*, 543 U.S. 997 (2004) (where patterns of deviation over-populate slow growth areas and under- populate fast growth areas, the pattern of deviation is not discriminatory.) Given that the majority-minority districts in Alabama are located in the central urban cores and rural areas of the state and that these areas have grown in the past two decades at a slower rate than the rest of the state and can reasonably be anticipated to do so in the next decade, the legislature of Alabama could have had a legitimate basis for intentionally over-populating the majority- minority districts. Because of the fact pattern mentioned in

> minimum number of additional people who would have to be added to each district turned in part on how much the legislature decided to permit a district to depart from the ideal size. In prior redistricting, Alabama had required districts to be within 5% of the size of an ideal district. In designing the post 2010 census districting plan, however, the framers decided instead to permit a deviation of only 1%. That decision significantly increased the number of additional individuals who would have to be added to an underpopulated district.

Alabama Legislative Black Caucus Br. at 6

As illustrated by Appellee's brief, the differences in the minority percentages in the majority-minority districts in the redistricting schemes proposed by African-American legislators for the 2014 election are not significantly different from the percentages in the enacted plan. Some districts are higher in the enacted plan and some districts are lower in the enacted plan. The principal complaint of Appellants' is that the State of Alabama "African-Americans in the majority-minority districts" and because these African-Americans were supposedly "packed" there was insufficient minority population to be placed in other districts where

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appellee's brief, most of the majority- minority districts have less population at this point in the decade than most other districts around the state. In view of this fact and this Court's summary affirmance of *Pataki*, the state's policy of equalizing the populations between districts is both legitimate and rational.

although candidates of the minority community's choice could not be elected non-Hispanic white Democrat candidates could be elected.[7] So if the differences in percentages are not creating the excess minority population necessary to fill these influence districts, how are the plans produced by Legislative Black Caucus able to do this? The answer is through manipulation of population deviation. None of the Appellants' plans actually meets the plus or minus 1% deviation standard adopted by the Alabama Legislature and they skew the population deviations to the benefit of the majority-minority and influence districts. This point is implicit in the question presented in the Alabama Democratic Conference brief "this goal, *particularly when combined with the new goal of significantly reducing population deviation among districts,* led the state to stark racial intentionality in district-drawing, packing more super majorities of black voters into already majority black districts..."[8] The Appellants themselves recognized in this statement that they could not achieve the results that Appellants sought—proportional representation in majority black districts and a maximization of black influence in as many remaining districts as possible—without intentional racially-based manipulation of the population deviation. Moreover the alternative redistricting schemes introduced into the Legislature by the Black Caucus illustrate the problem the two House of Representatives proposals at overall ranges of deviation of 10.00 and 9.96 percent. The two Senate alternatives were 9.69 and

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[7] *See* brief of Alabama Legislative Black Caucus at 9.

[8] *See* brief of Alabama Democratic Conference at i (emphasis added).

9.58 percent.[9] If the Alabama Legislative Black Caucus had been serious in its concern about the black voting age population percentage in each district as opposed to creating a map intended to maximize black influence as well as maximize the number of Democrats in the legislature, they would have drawn a map that complied with the plus or minus 1% population standard. As a result the alternative maps introduced in the Legislature proved little in appellants' case.

II. THE COURT'S PRECEDENT PREVENTS THE INTENTIONAL RACIAL MANIPULATION OF POPULATION DEVIATION IN ORDER TO FEED MINORITY INFLUENCE DISTRICTS THAT APPELLANTS SUGGEST ARE REQUIRED BY THE VOTING RIGHTS ACT.

In *Roman v. Sincock*, 377 U.S. 695, 710 (1964), this Court declared that the one person,one vote rule requires a court to:

> Ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur because of certain factors that are free

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[9] The McClammy House Alternative when stated in two digits past the decimal point rounds to 10% however it is actually a mere four people short. The Reed-Buskey House Alternative 4 had an overall range of deviation of 9.96%. Reed-Buskey Senate 2 was only slightly better, 9.69% and the Sanders Plan was 9.58%.

> from any taint of arbitrariness or discrimination "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The right to vote "includes the right to have the vote counted at full value without dilution or discount." *Id.* at 555 n.29 (quoting with approval *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)). Further:
>
> The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

Gray v. Sanders, 372 U.S. 368, 381 (1963). *See also Baker v. Carr*, 369 U.S. 186 (1962)

These cases state the undeniable theme that population equality in redistricting should be encouraged. This principle currently culminates in the decision in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga., 2004) (three-judge court) (sum. aff. *Cox v. Larios*, 542 U.S. 947 (2004) which established that if plaintiffs could prove a discriminatory pattern of population deviations, even if the overall range was less than 10%, and plaintiffs could prove, at the very least, that these population deviations did not come from any legitimate consistently applied rational state policy, then plaintiffs could state a violation of

the 14th Amendment's Equal Protection Clause for the violation of the one-person, one-vote principle.

In *Larios* the plaintiffs cited four reasons for the intentionally invidious discriminatory pattern of population deviations. One reason was that partisan politics created the discriminatory pattern of population deviations; the second reason was that regionalism drove the discriminatory pattern of population deviations; the third reason was that a bias in favor of the slow growth areas of the state as opposed to the fast growth areas of the state motivated the discriminatory pattern of population deviations; the fourth claim was that race was the reason for the discriminatory pattern of population deviations, which was styled as a racial gerrymandering claim and so described by the *Larios* court. *See generally Larios*, 300 F. Supp. 2d at 1325-31.

The reason the plaintiffs made all four of these claims was that there were districts which were exceptions to each of the four patterns, however each district that was an exception fell into one of the other three categories in the complaint. For instance there were districts in the South Georgia which were overpopulated but they were held by Republicans. *Id.* at 1326. There were other districts held by Republicans that were underpopulated but they would be in one of the slow growth areas. *Id.* The areas of inner-city Atlanta and South Georgia also correspond with most of the minority population in Georgia. *Id.* By including all four motivations there were no underpopulated or overpopulated districts that were not explained by the compliant.

The plaintiffs in their complaint in *Larios* asserted that race was as improper a motivation for the type of intentional discriminatory pattern of population deviation as was discrimination based on partisanship, regionalism, and discrimination against fast growth and slow growth areas. The court in *Larios* chose not to decide this race claim since it had already found for the plaintiffs based on other motivations. While the State of Georgia did not attempt the bold assertion that Appellants make in this case that an intentional racially motivated discriminatory pattern of deviation is required by the Voting Rights Act, the State of Georgia did assert that its motivations, including the racial ones, were legitimate rational state policies if the population deviations were kept below an overall range of deviation of 10%. *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1339-40 (N.D. Ga. 2004). The similarity of the racial fact patterns is undeniable, clearly if race can be a legitimate rational state policy if the population deviation is below an overall range of 10% then the similarity of the racial fact patterns between *Larios* and in what Appellants propose in this case would implicitly, if not directly, overrule this important case.

Larios v. Cox has been a seminal case in the 2010 redistricting cycle. Many jurisdictions have adopted criteria and drawn their redistricting maps in order to comply with the principles enunciated in *Larios*. Even more jurisdictions have rejected redistricting maps proposed by minority organizations, minority caucuses and Democratic party groups which intentionally underpopulated majority minority or heavily minority districts in

order to use reliable minority voters to shore up non-Hispanic white Democratic candidates based upon the principles enunciated in *Larios*.[10] The advocates for these redistricting maps which intentionally underpopulate districts based on race and ethnicity has been that they are either required by Section 5 or Section 2 of the Voting Rights Act.

Despite these assertions the Department of Justice has refused to interpret the Voting Rights Act to require such population deviations. The Department of Justice has never required unequal population for preclearance in the 48 years of administering Section 5. In its *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, which explicitly "is not legally binding," the Department of Justice stated: "Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*; *Notice*, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). The Department has also acknowledged the obvious, that compliance with constitutional equal population requirements could

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[10] *Cf. Harris v. Arizona Independent Redistricting Commission*, No. 14-232, currently on appeal to this Court, where the Arizona redistricting commission intentionally underpopulated the districts with significant minority components claiming this was necessary in order to comply with the Voting Rights Act. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1090-91 (D. Ariz. 2014) (Wake, J., dissenting). The conduct of the Arizona Independent Redistricting Commission is exactly the type of conduct appellants seek to require in Alabama.

result in unavoidable retrogression. Long ago the Department stated:

> Similarly, in the redistricting context, there may be instances *occasioned by demographic changes* in which reductions of minority percentages in single-member districts are unavoidable, even though "retrogressive," *i.e.*, districts where compliance with the one person, one vote standard necessitates the reduction of minority voting strength.

Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (Jan. 6, 1987) (emphasis added). The current guidance is to the same effect. 76 Fed. Reg. at 7472. This concession to demographic change, where it happens, is dictated by the text of Section 5 itself, which does not forbid all retrogression in the minority's "ability to elect their preferred candidates of choice" Rather, to deny preclearance the text also requires that the retrogression be "on account of race or color or in contravention of the [language] guarantees." The "on account of" language was necessary to keep Section 5 validly within Congress's enforcement power. But whether or not it is constitutionally necessary, it is there. Retrogression because of relative population changes is not on account of race or language.

Furthermore, nothing in the text of the Voting Rights Act purports to require or authorize population inequality in legislative districting, directly or by implication. *See* 52 U.S.C. § 10304(a).

Section 17 of the Voting Rights Act forbids it in sweeping terms:

> Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.[11]

Also the decisions of this Court would appear to incorporate the one person, one vote principle into its basic understanding of the requirements for a majority minority district required by the voting rights act. In *Thornburg v. Gingles* this Court stated that in order to state a claim under Section 2 of the Voting Rights Act "the minority group must be able to demonstrate that it is *sufficiently large* and geographically compact to constitute a majority in a single-member district." [12] sufficiently large can have no reasonable meaning other than as an intrinsic requirement under the voting rights act that any remedial district must meet the requirements of the 14th amendment equal protection clause's one person one vote principle. Justice Kennedy in his decision for the court and *LULAC v. Perry*[13] announced an analogous principle regarding compactness. In that case he made it clear that a district that was not sufficiently compact could not be deemed a district drawn in compliance with the voting rights act and therefore could not be counted

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[11] 52 U.S.C. §10311

[12] 478 U.S. 30, 50 (1986) (emphasis added; citations omitted)

[13] *League of Latin American Citizens(LULAC) v. Perry*, 548 U.S. 399 (2006)

toward proportional representation. The principle is even more applicable here because the one person, one vote requirement unlike the compactness requirement comes directly from the 14th amendment's Equal Protection Clause, whereas the Voting Rights Act is a statutory gloss on the exact same clause. Essentially the Voting Rights Act does not cause the Equal Protection Clause to be at war with itself. It also opens a Pandora's box.

If it is the case that one person, one vote does not apply to racially and ethnically drawn Voting Rights Act districts and it is to be treated as a federally required neutral redistricting criteria such as county and city lines then the obvious question becomes why stop at an overall range of 10%? In *Mahan v Howell*, 410 U.S. 315 (1973), this Court made clear that if a legitimate rational state policy is consistently applied, the deviations could constitute an overall range as high as 16.25%. The one thing that cannot be argued is the application of the racially and ethnically-based deviation will be *very consistent* since its purpose is to maximize both the racial/ethnic voting strength and in almost all cases Democratic party performance. This will become standard practice in all Democrat controlled jurisdictions and there may well be litigation to enforce it as a requirement in others.

Furthermore, the Constitution does not grant Congress power to enact legislation requiring or permitting population inequality among voting districts. The Fourteenth and Fifteenth Amendments grant Congress power to enforce by "appropriate legislation," which must be "plainly

adapted" to the end of enforcing equal protection of the laws or preventing abridgement of the right to vote on account of race, consistent with "the letter and spirit of the constitution." *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966). [14]

An intentional racial or ethnic pattern of deviation would constitute an impermissible use of race in the same manner as *Shaw v. Reno* and its progeny.[15] By definition the selection of under and overpopulated districts would be based predominantly on race and implicates the exact same harm identified in the *Shaw* cases and their progeny, the stereotyping of the races. However, in the case of population deviations, unlike any of the Shaw cases or its progeny, there is the actual individualized harm of vote dilution occurring to all the voters in the overpopulated districts. This actually implicates the discussion in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (*UJO*), where this Court suggested that if a jurisdiction by putatively complying with the voting rights act diluted the vote of voters who were not being protected by the voting rights act then the jurisdiction would not be required by the

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[14] Many of these exact same issues are presented in the *Harris v. Arizona Independent Redistricting Commission*, No. 14-232 (docketed Aug. 28, 2014) and is discussed by Judge Wake's dissent. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1102-06 (D. Ariz. 2014) (Wake, J., dissenting)

[15] 509 U.S. 630 (1993) (*Shaw I*); *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900 (1995); *Abrams* v. *Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996)

voting rights act to take that action and if they did the voters who were diluted would have a 14th amendment cause of action. Even though Justice Stevens dissented in *Shaw v. Reno* and all of its progeny he was quite clear that the situation in the UJO hypothetical would in fact state a 14th amendment cause of action.[16]. If the voting rights act permits otherwise unconstitutional numerical vote dilution, then it exceeds Congress's power to enforce the Fourteenth and Fifteenth Amendments' commands of equal voting rights.

Finally, intentional racial or ethnic manipulation of population deviations implicates exactly the same policy concern which this Court correctly alluded to in *Bartlett v. Strickland* when it said "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (Kennedy, J.); *see also Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). That interpretation would result in a substantial increase in the number of mandatory districts drawn with race as "the predominant factor motivating the legislature's decision." *Miller v. Johnson*, 515 U.S. 900, 916(1995). The only difference would be that intentional racial or ethnic manipulation of population deviations will implicate a far greater number of districts, because of the large number of districts which will have to be overpopulated far from the geographic area that actually caused the problem, and create more vote dilution than the creation of crossover or influence districts even though influence and crossover

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[16] *Shaw I* 509 U.S. at 678.

districts will be the ultimate goal of the intentional population deviations manipulation. As is the case for the intentional manipulation of the population deviations based on race and ethnicity Appellants' suggestion that crossover or influence districts are required by the Voting Rights Act is also antithetical to this Court for our precedents as well as the intent and text of the act.

III. THE VOTING RIGHTS ACT DOES NOT REQUIRE THE CREATION OF INFLUENCE OR CROSSOVER DISTRICTS

This is not the first time that this Court has reviewed a version of Appellants' legal theory. In *Voinovich v. Quilter,* the Court faced exactly this type of claim.[17] The Democrats claimed that "the plan [drawn by Republicans] packed black voters by creating districts in which they would constitute a disproportionately large majority," thereby violating §2 of the Voting Rights Act. *Voinovich v. Quilter*, 507 U.S. 146, 149 (1993). In the Democrats' view, "the plan should have created a larger number of influence districts -- districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of crossover votes from white voters, elect their candidates of choice [i.e. NHW Democrats]." *Id.* at 149-50 The District Court found for the NHW Democrat plaintiffs; however this Court in a unanimous opinion reversed.

The Court refused to decide "whether influence dilution claims such as appellees' are

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[17] 507 U.S. 146 (1993)

viable under section 2."[18] The court noted that this case did not involve the usual vote dilution claims of "fragmentation of a minority group" (cracking) or that "Ohio's creation of majority black districts prevented black voters from constituting a majority in additional districts." (packing)[19] However, the Court did say that while the "first *Gingles* precondition—the requirement that the group be sufficiently large to constitute a majority in a single member district, would have to be modified," *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), — the other two preconditions would definitely apply if an influence claim were actionable.[20] The Court then noted that it was necessary for the plaintiffs' argument to assert "coalitional voting between whites and blacks" and that black interests could be adequately represented from "districts with only a 35% black population."[21] The Court used these factual concessions to find that plaintiffs failed to prove the polarized voting requirements of the *Gingles* preconditions.[22]

It appeared as a result of *Voinovich,* the argument that the failure to maximize NHW Democrat districts violates §2 was dead since, factually, the proof of polarized voting would necessarily defeat the argument that minorities could be adequately represented at such low

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[18] *Id* at 154.

[19] *Id* at 153.

[20] *Id* at 158.

[21] *Id* at 151-152. The choice of 35 percent is significant because it is in the range of the quota of black vote typically needed to draw a safe white Democrat district.

[22] *Id* at 158.

percentages and, conversely, the lack of polarized voting prevents the invocation of the protections of §2 of the Voting Rights Act. Ironically, this is exactly what the federal district court did in New Jersey.[23] Despite this, Democrats persisted with this theory which they pressed forward in the *LULAC* case. Justice Kennedy disposed of this theory in the exact same manner as had been done in *Voinovich*.[24]

Democrat proponents persisted with this legal theory and as a result this Court was forced to deal with the question of whether influence districts were a viable cause of action under §2 of the Voting Rights Act. In *Bartlett v. Strickland*,[25] a five to four decision, Justice Kennedy, writing for the Court, forcefully said that in order to state a claim for vote dilution under §2 a plaintiff must assert that a reasonably compact majority-minority district can be drawn in the area in question. Section 2 does not require the construction of influence districts.

Likewise, this would appear to be inconsistent with the requirements of the 2006 reauthorization of §5 of the voting rights act. By adopting these amendments, Congress legislatively reversed the United States Supreme Court's decision in *Bossier II* and any portion of *Ashcroft* allowing states to prefer coalition or influence districts over districts that allow minorities to elect their preferred candidates of choice. In so doing, Congress endorsed many of the arguments advanced by Justice Souter in the dissenting opinion *in Ashcroft*. *See* Report of the

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[23] *Page v Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001).
[24] *LULAC* at 443.
[25] 556 U.S. 1 (2009)

Senate Committee on the Judiciary, 109th Cong. Report 295, pp. 16-18 (hereinafter Senate Report) ("Any Discriminatory Purpose") and pp. 18-21 ("Preferred Candidate of Choice"); Report of the House Committee on the Judiciary, 109th Cong. Report 478 pp. 65-72. By expanding the statutory definition of "discriminatory purpose," Congress incorporated into § 5 the constitutional standard established in cases such as *Mobile v. Bolden,* 446 U.S. 55 (1980) *Washington* v. *Davis,* 426 U.S. 229 (1976) Senate Report p. 16, and *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977) *("Village of Arlington Heights"). See* House Report, pp. 66-68. Consistent with this intent, the Senate Report cautioned that:

> [S]ome witnesses raised concerns that the amendment could be misinterpreted, and that the Justice Department or Federal Courts might compel the creation of so-called influence or coalition districts. The adopted language does not prevent state officials from declining to combine a group of minority voters with a group of white voters who tend to support the same parties and candidates in a district where candidates supported by minorities will reliably prevail. Although such an action may make it more difficult for that coalition of voters to elect their preferred candidate, *the Voting Rights Act . . is not designed to protect political parties, or to prevent statewide political realignment from being reflected in the redistricting process. Nor can any racial or political group claim a right under the*

> *Fourteenth Amendment to have its members placed as often as possible in districts where candidates of the party favored by that group's members will prevail . . . .*
>
> The language "any discriminatory purpose" does not permit a finding of discriminatory purpose based on a determination that the plan seeks partisan advantage , . or protects incumbents.

Senate Report pp. 18 (emphasis added).

Both the Senate and the House reports explain that amended § 5 is designed to prevent elected officials from "unpacking" majority-minority districts and changing them into "influence" or "coalition" districts. *See, e.g.*, Senate Report p. 19; House Report pp. 68-71. Amended § 5 does not "lock into place coalition or influence districts" or "the competitive position of a political party." Senate Report p. 21. Congress "explicitly reject[ed] all that logically follows from Justice O'Connor's statement [in *Ashcroft]*" that state legislatures "should not focus solely on the comparative ability of a minority groups to elect a candidate of choice." House Report p. 71. Instead, under the § 5 effects test, as amended, "the relevant analysis . . . is a comparison between the minority community's ability to elect their preferred candidate of choice before and after a voting change." *Id.*

In summary, following the 2006 reauthorization of § 5, it remains settled that a jurisdiction could lawfully enact redistricting plans

that increase the number of districts that allow a minority group to elect their preferred candidates of choice. Preclearance will now be denied if a redistricting plan has any discriminatory purpose. A discriminatory purpose may be established if a plan intentionally fails to create districts that allow minority voters to elect their preferred candidates of choice. Federal Register, Vol. 76, No. 27 p. 7471 (February 9, 2011) (citing *Busbee v. Smith,* 549 F. Supp. 494, 508 (D.D.C. 1982), *aff'd,* 459 U.S. 1166 (1983), *Garza and United States v. County of Los Angeles,* 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J. concurring and dissenting in part), *cert. denied,* 498 U. S . 1028 (1991)).

Discriminatory purpose is not established because a jurisdiction refuses to create "coalition" or "influence" districts or because a new redistricting plan realigns political power within a state. Jurisdictions may not substitute coalition or influence districts, supported by incumbents or the party favored by minorities, for districts that allow minority voters to elect their candidates of choice. Instead, under the "effect" clause, whether an objection will be made depends upon whether a new plan reduces the number of districts that allow minorities to elect their preferred candidates as compared to the benchmark.

In short, neither Section 2 nor Section 5 of the Voting Rights Act has required the creation of crossover or influence districts nor does the voting rights act require an intentional racial or ethnic manipulation of population deviations in order to maximize either minority districts or influence.

Indeed since Republican votes were critical at each stage of the passage of the voting rights act it would seem extremely odd that the act was intended as a statutory requirement for a perpetual Democratic gerrymander. Such an interpretation stretches all credulity. Furthermore such statutory interpretation would create an unnecessary constitutional doubt which the Court's standards of statutory interpretation required to be avoided.[26] The Court should be sensitive to the fact that African-Americans in Alabama faced no vote dilution as a result of this redistricting plan. Because the harm under the *Shaw v. Reno* standard is racial stereotyping[27] and not vote dilution the court needs

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[26] *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (*citing NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."))). *See also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt").

[27] 509 U.S. 630 (1993). *Shaw* is often viewed by the press as part of the Supreme Court's "reverse discrimination" line of cases. O'Connor specifically disclaims this, noting

to take care that appellants, governmental jurisdictions and lower courts do not take any decision by this court in this case as carte blanche or

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that "appellants did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength." *Id* at 641. In fact, she uses this point to distinguish *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (*UJO*). *Id* at 651-52. The factual difference between vote dilution cases, the *Shaw* line of cases, and all of the "reverse discrimination" cases is the harm. All of the reverse discrimination cases have involved admissions or selection, employment, or contracting where specific plaintiffs or groups of plaintiffs were directly injured by the racial classification. Vote dilution cases of all types have relied on the concept that one group of voters ballots are made more powerful than another group's ballots because of the structure of the election system. If this is the harm which constitutes a Fourteenth Amendment violation (as was asserted by the plaintiffs in *UJO*) then none of the so-called "black maximization" redistricting plans of the 1990s redistricting cycle could constitute dilution of white voting strength since none of the so called "black maximization" plans ever reached proportional representation. Essentially, white voters even under the most aggressive "black maximization" plans retained a disproportionate share of the electoral power. Therefore, Justice O'Connor identifies the harm as a general societal one that "reinforces societal stereotypes". Despite the Court's denial that this is a "reverse discrimination" case, a term the court has disclaimed before because the Court declares it simply to be discrimination no matter the identity of the group discriminated against; it is clear. given the citations to *Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that the "reverse discrimination" line of cases has informed the Court's thinking in the *Shaw* line of cases.

even a requirement to engage in real vote dilution against the majority of the voters in numerous jurisdictions across the country as a result an explicit rejection of appellants theory of the case is necessary in order to avoid a far greater harm.

CONCLUSION

As a result, this Court should explicitly reaffirm that a jurisdiction has the right to improve population equality if it chooses to do so and that the Voting Rights Act cannot be used as an excuse for increasing population deviations. Furthermore, the Court should reaffirm its prior holdings that the Voting Rights Act does not require or protect crossover influence districts.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 13-895, 13-1138

In the

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,
Appellants,

v.

ALABAMA, et al.,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, et al.,
Appellants,

v.

THE STATE OF ALABAMA, et al.,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND PROJECT 21 IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the plaintiffs proved that Alabama's legislative redistricting plans for the House and Senate unconstitutionally classify black voters by race on a statewide basis, even though they did not show that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), and Project 21 respectfully submit this brief amicus curiae in support of Appellees, the State of Alabama, et al.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases relevant to these cases. *See, e.g.*, *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *City of Rome v. United States*, 446 U.S. 156 (1980). PLF submits this brief because it believes its public policy perspective and litigation experience in the area of voting rights will provide an additional viewpoint with respect to the issues presented.

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

immigration and assimilation. CEO supports color-blind public policies, and seeks to block the expansion of racial preferences and to prevent their use in employment, education, and voting. CEO has participated as amicus curiae in past Voting Rights Act cases, such as *Shelby County*, 133 S. Ct. 2612; *Nw. Austin Mun. Util. Dist. No. 1*, 557 U.S. 193; *Bartlett*, 556 U.S. 1; and *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times during hearings on the 2006 reauthorization of the Voting Rights Act.

Project 21, the national leadership network of black conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 participated as amicus curiae in *Shelby County*, 133 S. Ct. 2612; *Nw. Austin Mun. Util. Dist. No. 1*, 557 U.S. 193; and *Bartlett*, 556 U.S. 1. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work.

Amici Curiae have a substantial interest in preventing the racial segregation and gerrymandering of voting districts that is the result of Section 2 and Section 5 of the Voting Rights Act. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases concern the interplay between this Court's racial gerrymandering cases, Section 5 of the Voting Rights Act, and the Equal Protection Clause. The first permits consideration of race in redistricting, the second requires it,[2] and the third forbids it. Prior to *Shelby County*, 133 S. Ct. 2612, Alabama was subject to Section 5 of the Voting Rights Act of 1965 (Section 5), 52 U.S.C. § 10304, which required the state to obtain preclearance from the Department of Justice or the United States District Court for the District of Columbia before any new "standard, practice, or procedure with respect to voting" could go into effect. Under Section 5, legislative district lines would not be precleared unless the state could prove they would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (quoting *Beer*, 425 U.S. at 141).

After the 2010 Census,[3] the Alabama Legislature hired an expert to help draw district lines that complied with Section 5. *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1244 (M.D. Ala. 2013). The expert considered many factors; in

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[2] As explained below, the non-retrogression principle from *Beer v. United States*, 425 U.S. 130, 141 (1976), requires states to consider race in order to comply with Section 5 of the Voting Rights Act.

[3] After each decennial census, the Alabama Constitution requires the state legislature to "fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them." Ala. Const. art. IX, § 199.

particular, the Legislature requested that the population deviation among districts be only one percent, as opposed to the five percent guideline used in prior redistricting cycles.[4] *Id.* at 1245. The purpose of the one percent guideline was to comply with the constitutional one-person, one-vote requirement of *Reynolds v. Sims*, 377 U.S. 533 (1964), especially in light of a recent case that cast doubt on the ability of states to use a five percent deviation as a "safe harbor" for compliance.[5] *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1245-46 (citing *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004)). The Legislature also instructed the expert to consider traditional redistricting criteria such that district lines "be contiguous and reasonably compact, be composed of as few counties as practicable, avoid contests between incumbent members whenever possible, and respect communities of interest." *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1245. Of course, because of Alabama's status as a covered jurisdiction under Section 5, the expert was also required to consider the racial makeup of resultant districts in order to ensure that there was no "retrogression" in the position of African-American voters.

After the redistricting plans were signed into law, Plaintiffs challenged them on the grounds that they were unconstitutional racial gerrymanders under the Fourteenth Amendment and unlawfully diluted the voting strength of African-Americans in violation of Section 2 of the Voting Rights Act (Section 2), 52

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[4] The population of each district must be within one percent, above or below, the population of the state's mean district.

[5] Several states adopted a one percent deviation guideline during the 2010 round of redistricting. *See id.* at 1246.

U.S.C. § 10301. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1237. The district court rejected both claims. *Id.* at 1312. The court held that, assuming Plaintiffs had standing, the plans were not an unconstitutional racial gerrymander because race was not the "predominant factor motivating the decision of the Legislature." *Id.* at 1293. "Although race was a factor in the creation of the districts," it was just one of many alongside compliance with one-person, one-vote and other traditional districting criteria. *Id.* at 1293-96. Thus, under prevailing Supreme Court precedent, it was unnecessary to apply strict scrutiny. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 658 (1993); *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). In the alternative, however, the district court held that even if race was the predominant factor in the redistricting decisions, the Legislature's use of race was constitutional because it was narrowly tailored to comply with Section 5. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1306-12.

The district court correctly applied existing precedent; under *Shaw* and its progeny, redistricting acts which consider race as just one of many factors do not violate the Equal Protection Clause. However, *Shaw* is inconsistent with this Court's more recent equal protection jurisprudence mandating strict scrutiny whenever race is *any* factor in an official decision. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (holding that strict scrutiny applies whenever the state "considers" race); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 741 (2007) (same); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local

governmental actor, must be analyzed by a reviewing court under strict scrutiny."). Accordingly, this Court should extend its decision in *Shaw* to explain that any redistricting decision should be required to satisfy strict scrutiny upon a judicial determination that the Legislature used race as a factor in drawing district lines. Although application of strict scrutiny is nearly always fatal, in this case the Alabama Legislature considered race only to the extent necessary to satisfy the United States and Alabama Constitutions. The judgment below should be affirmed on that limited basis.

ARGUMENT

I

THE COURT SHOULD AFFIRM THE JUDGMENT BELOW ON THE NARROW GROUNDS THAT ALABAMA'S USE OF RACE WAS NECESSARY TO REDISTRICT IN COMPLIANCE WITH ONE-PERSON, ONE-VOTE AND THE STATE CONSTITUTION

The lower court's judgment in favor of Alabama on Plaintiffs' racial gerrymandering claims should be affirmed because the Legislature's consideration of race was limited to ensuring it was able to comply with the United States and Alabama Constitutions. The Alabama Constitution requires the state to redistrict every ten years. Ala. Const. art. IX, § 199. In 2010—when the state needed to redistrict—Alabama was subject to Section 5 preclearance, so in order to ensure that the new district lines did not cause "retrogression," the Alabama Legislature was required to consider the race of the resulting districts. Put

simply, before this Court's decision in *Shelby County*, 133 S. Ct. 2612, ensuring that the new district lines would not lead to retrogression of black voters was a condition precedent for lawfully adopting a redistricting plan in Alabama. Alabama's consideration of race was limited to satisfying its constitutional obligation to redistrict, as it was then understood.

Alabama's limited consideration of race to comply with Section 5 was in effect the *only* means Alabama could have used to satisfy its constitutional requirement to redistrict. The district court correctly concluded that the redistricting plan only used race as required by Section 5 because "[t]he more stringent version of section 5 that Congress enacted in 2006 required the Legislature to maintain, where feasible, the existing number of majority-black districts and not substantially reduce the relative percentages of black voters in those districts." *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1311. Because Alabama's consideration of race was required by Section 5, the redistricting acts were necessarily narrowly tailored to ensuring the state was able to comply with the Alabama Constitution.

Moreover, Alabama was also required to redistrict in order to comply with the federal Constitution. Section 2 of the Fourteenth Amendment, which abolished the Three-Fifths Clause, provides that "[r]epresentatives shall be apportioned among the several States according to their respective numbers." U.S. Const. amend. XIV, § 2. The Equal Protection Clause includes a "one-person, one-vote" requirement that requires state legislatures to, "as nearly as is practicable," balance legislative districts by population. *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Wesberry v.*

Sanders, 376 U.S. 1, 7-8 (1964); *Reynolds*, 377 U.S. at 568. There is no dispute that Alabama would have been in violation of the one-person, one-vote principle had it failed to redistrict according to its constitutional mandate after the 2010 Census. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1241. Therefore, it follows that Alabama needed to redistrict in order to satisfy both the Fourteenth and Fifteenth Amendments.

The dissent below errs in its claim that the redistricting plan was not narrowly tailored because a plan that permitted greater deviations in district populations would have resulted in fewer minority voters being shifted into new districts. *See id.* at 1315 & n.2 (Thompson, J., dissenting). The Legislature's decision to adopt a one percent deviation was not racially motivated; as noted above, Alabama would have been in violation of one-person, one-vote had it failed to redistrict after the 2010 Census. *See id.* at 1241 (majority opinion). Because of the large population disparities between districts—owing to prior redistricting plans[6] and natural population shifts—compliance with the one percent guideline required significant changes in district lines. Thus, the selection of a one percent standard was race-neutral; its purpose was to bring Alabama into compliance with the Constitution's one-person, one-vote requirement. *Id.* at 1293 ("[T]he main priority of the Legislature was

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[6] The prior district lines created by a Democrat-dominated legislature contained stark racial disparities. For example, the district court found that at the time of the 2010 Census, 25 of the 27 majority-black districts were underpopulated by more than five percent and nine by more than 20 percent. *Id.* By contrast, one majority-white district was overpopulated by over 60 percent. *Id.*

to comply with the constitutional mandate of one person, one vote.").

Absent a showing that the Legislature's intent in complying with *Reynolds* was discriminatory, it is irrelevant that the *impact* of the decision was to change the district designations of more black citizens than white citizens. *See Washington v. Davis*, 426 U.S. 229, 239-41 (1976) (disparate impact, standing alone, is not sufficient to show a violation of the Equal Protection Clause). Here, the evidence shows that race was considered only to the extent necessary to comply with the Voting Rights Act. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1245. And where there is no evidence that complying with *Reynolds* was racially motivated, the impact of that decision should not be strictly scrutinized.

While the Legislature may have been able to comply with *Reynolds* with somewhat less dramatic district line shifts, it does not follow that race motivated the decision to choose a one percent guideline. "[T]he overriding objective [of apportionent] must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579. Alabama should not be penalized for attempting to come as close as possible to population equality while also complying with the Voting Rights Act.[7] The final

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[7] This is especially true because *Larios* cast doubt on the idea that a state is immune from a one-person, one-vote challenge when the population disparity does not exceed ten percent in any district. The *Larios* Court summarily affirmed the district court's finding that one-person, one-vote was violated even where all population

(continued...)

approved district lines complied with the one percent guideline and, in turn, the Constitution's one-person, one-vote requirement. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1256.

Given this Court's decision in *Shelby County*, the situation presented to Alabama in this case is unlikely to recur. No state is currently subject to Section 5 preclearance, and therefore no state must consider race to safeguard against claims of retrogression. Here, however, Alabama was required to consider race to ensure that it was able to satisfy its constitutional obligation to redistrict every ten years and to remain compliant with the Constitution's one-person, one-vote principle. Because compliance with Section 5's race-conscious mandate was necessary to accomplish these compelling interests, Alabama's limited use of race satisfies strict scrutiny. The decision below should be affirmed on this limited basis.

II

STRICT SCRUTINY SHOULD APPLY WHENEVER THE GOVERNMENT MAKES A RACE-BASED DECISION

Although the judgment in these cases should be affirmed because of the specific difficulties presented by Alabama's former coverage under Section 5, the larger issue is the scope of review required where, as here, it is shown that race was a factor in a

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[7] (...continued)
deviations were less than five percent from the mean district. *See* 542 U.S. at 947; *id.* at 951 (Scalia, J., dissenting) (discussing the lower court's findings). In light of *Larios*, Alabama's decision to reduce population disparities to less than one percent was quite sensible.

redistricting decision. Constrained by this Court's decisions in *Shaw*, 509 U.S. at 658, and *Hunt*, 526 U.S. at 547, the court below held that strict scrutiny only applies where race was the "predominant factor" in the Legislature's redistricting decision. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1293. This case provides a good vehicle for the Court to extend *Shaw* and *Hunt*. This Court should make clear that whenever a state actor makes race a factor in an official decision—whether contracting, education, or redistricting—the action is unconstitutional unless it is the least restrictive means of furthering a compelling governmental interest. *See Adarand*, 515 U.S. at 227; *Fisher*, 133 S. Ct. at 2418-19.

The *Shaw* Court held that strict scrutiny is required when a redistricting scheme is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." 509 U.S. at 658; *see also Hunt*, 526 U.S. at 547 ("[S]trict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision."). To establish a racial gerrymandering claim, a plaintiff must show that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Hunt*, 526 U.S. at 547 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). If the plaintiff can prove that race was the predominant factor, the redistricting legislation will be subjected to strict scrutiny; if not, it will generally be sustained. *See id.*

Permitting race-based redistricting decisions without strict scrutiny is inconsistent with this Court's understanding of the Equal Protection Clause in other contexts. *See* Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. Pitt. L. Rev. 1, 18 (2010) ("The Supreme Court is much quicker to apply strict scrutiny to affirmative action cases than it is to racial redistricting cases."). This Court has repeatedly held that "all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized." *Hunt*, 526 U.S. at 546; *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" (quoting *Adarand*, 515 U.S. at 227)). It is irrelevant whether the government's motives are pure or malevolent; all government action that classifies citizens on the basis of race is inherently suspect. *Johnson v. California*, 543 U.S. 499, 505 (2005); *Fisher*, 133 S. Ct. at 2430 (Thomas, J., concurring). Even a showing that race was but one of many factors is insufficient to avoid strict scrutiny. *See Grutter*, 539 U.S. at 326 (applying strict scrutiny to admissions policy that considered race as one of many factors); *Fisher*, 133 S. Ct. at 2415 (majority opinion) (same). Similarly, in the redistricting context, it should be no answer to say that the Legislature only slightly considered race, or that it placed other factors ahead of racial considerations. Any consideration of race by a governmental body must be subjected to strict scrutiny.

A. Federal Courts Are Able to Determine When a Government Entity Makes a Decision "Because Of" Race

The Court has permitted redistricting legislation to avoid the most searching level of judicial scrutiny, even where a state admits that race played a role in its official decisionmaking. This aberration appears to be partly the result of the inherent difficulty in distinguishing between mere consciousness or awareness of race and racially motivated legislation. Indeed, this Court has recognized that legislative actors—and most everyone else in our society—will be aware of race when making decisions with legal implications. *See Shaw*, 509 U.S. at 646. But this Court has also clarified that mere race awareness "does not lead inevitably to impermissible race discrimination." *Id.*

A discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). While it is true that many legislative decisions are made with knowledge of race, it does not follow that race was a factor in these decisions. Such reasoning would invalidate nearly every voting regulation. *See Shaw*, 509 U.S. at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

Courts are in the best position to make the factual findings necessary to determine when official action is

made *because of* race.[8] Reapportionment statutes should not be exempt from the same exacting scrutiny given to all other race-based classifications simply because the line between race-awareness and race-consciousness may be difficult to ascertain. It is possible to be aware of race and at the same time act in a race-neutral manner, and in such cases, the actions of legislatures should stand, regardless of the impact the decision has upon racial groups. *See Davis*, 426 U.S. at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."). It is only when racial considerations motivate a decisionmaker that the decision should be examined closely in order to

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[8] The *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* inquiry into legislative motive is an exception to the general rule that an otherwise constitutional statute will not be struck down "on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Indeed, even the *Arlington Heights* Court recognized that questioning legislative motivation represents a "substantial [judicial] intrusion into the workings of other branches of government." 429 U.S. 252, 268 n.18 (1977). But given the "ingenious defiance" of equal protection perpetrated by government in our nation, a "sensitive inquiry" into legislative motivation in this context is often necessary. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (explaining how southern states denied equal protection in purportedly race-neutral ways); *Arlington Heights*, 429 U.S. at 266 (detailing how courts should determine intent for race-neutral legislation in alleged discrimination cases).

determine whether a compelling governmental interest necessitated the action.[9]

B. The *Arlington Heights* Framework Can Be Applied to Race-based Redistricting Claims

The courts already possess a valuable tool in determining whether race motivated a particular action. Recognizing that "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one," this Court held that deference to official action is not warranted so long as the plaintiff proves "that a discriminatory purpose has been a motivating factor in the decision." *Arlington Heights*, 429 U.S. at 265-66. The *Arlington Heights* rationale should apply equally to redistricting cases.[10]

The *Arlington Heights* framework is applied in many difficult circumstances in an attempt to ferret out impermissible racial motivation from reliance on

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[9] The district court recognized the difference between awareness and motivation, but concluded that the Legislature was entitled to deference and a presumption of good faith on this point in part due to the difficulty in drawing that distinction. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1293 (citing *Miller*, 515 U.S. at 916). But, as explained above, courts routinely parse such a distinction in racial discrimination cases. *See Feeney*, 442 U.S. at 279. That racial motivation may be difficult to prove does not mean that courts are incapable of deciding cases along these lines. *See Bush*, 517 U.S. at 1000-01 (Thomas, J., concurring in the judgment).

[10] In fact, in *Wright v. Rockefeller*, 376 U.S. 52 (1964), decided well before *Shaw*, this Court upheld a New York legislative apportionment statute on the ground that the plaintiffs failed to show that race motivated the drawing of the district lines.

permissible, race-neutral factors. Concluding that a legislative body was at least in part motivated by race does not imply that the body was motivated by "any dislike, mistrust, hatred or bigotry" against a minority group. *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). Nevertheless, basing a decision even in part on racial considerations in and of itself demands strict scrutiny, regardless of the nature of the decisionmaker's actual intent. Hence, the Court has directed lower courts to conduct a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. It is the application of strict scrutiny that acts to "smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Grutter*, 539 U.S. at 326 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (internal quotation marks omitted)).

The initial inquiry in racial gerrymandering cases should concern whether race was used as a factor in the legislative decisionmaking process. This is analogous to the inquiry that applies in an *Arlington Heights* case, where courts must determine whether facially neutral laws are racially discriminatory in fact. *See United States v. Thurmond*, 7 F.3d 947, 952 (10th Cir. 1993). It is also the same inquiry this Court has conducted to determine if race was the "predominant factor" in redistricting. *See Miller*, 515 U.S. at 917-18 (citing *Arlington Heights* in concluding that race was the predominant factor in the drawing of Georgia's Eleventh Congressional District). The *Arlington Heights* Court instructed lower courts to consider many different factors in order to determine "whether

invidious discriminatory purpose was a motivating factor" in the government's decision. 429 U.S. at 266. Through a similar evidentiary framework, courts can determine when race has been used as a factor in legislative decisionmaking.[11] *See Miller*, 515 U.S. at 917-18; *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 WL 5019686, at *6-14 (E.D. Va. Oct. 7, 2014) (concluding, based on several evidentiary factors, that an attempt to comply with Section 5 was the predominant factor in the drawing of Virginia's Third Congressional District). Where legislation is adopted in part based on race, it is presumed unconstitutional and should be struck down in most cases. *Fisher*, 133 S. Ct. at 2421 ("Strict scrutiny must not be strict in theory but feeble in fact.").

C. Federal Courts Can Distinguish Between Racial and Political Gerrymanders

Related to the difficulty in determining whether race motivated an official decision, is the difficulty in distinguishing between racial gerrymanders—which are presumed unconstitutional—and political gerrymanders—which a plurality of this Court held to be non-justiciable. *Compare Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960), and *id.* at 349 (Whittaker, J., concurring), *with Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality opinion). There is a significant

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[11] In the present case, an *Arlington Heights*-like inquiry is unnecessary because it is undisputed that race was a factor in the legislation. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1293 ("[T]he Legislature sought to comply with sections 2 and 5 of the Voting Rights Act by preserving—and, in the House, increasing—the majority-black districts and by not substantially reducing the percentage of black persons in those districts.").

distinction between racial and political gerrymandering. Political gerrymanders are "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (citation omitted). On the other hand, it is never a lawful purpose to segregate voters on the basis of race. *Id.* at 286; *see also City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 86 (1980) (Stevens, J., concurring in the judgment) (concluding that the Equal Protection Clause compels courts to invalidate racial gerrymanders). Indeed, the *Vieth* Court rejected the *Shaw* standard for political gerrymandering cases precisely because there is an inherent distinction between political decisions and decisions motivated by race.[12]

Yet it is often true that race and political affiliation are highly correlated. In fact, one criticism of the Court's redistricting cases is that they have encouraged state legislatures to use partisan affiliation as "benign racial proxies." *See* Michelle E. O'Connor-Ratcliff, *Colorblind Redistricting: Racial Proxies as a Solution to the Court's Voting Rights Act Quandary*, 29 Hastings Const. L.Q. 61, 79-85 (2001). However, that race and partisanship are highly correlated in many states, including Alabama, does not render every political gerrymander racially motivated. The suggestion that states are now encouraged to use indicators such as partisan affiliation to discriminate on the basis of race rings hollow; it seems far more likely that a legislature would use *race* as a proxy for

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[12] The *Hunt* majority agreed when it noted that "prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." 526 U.S. at 551 (emphasis in original).

political affiliation. After all, redistricting is an "inherently political process," *Bush*, 517 U.S. at 1012 n.9 (Stevens, J., dissenting), and race may provide the most tempting approximation of a district's political leanings.[13] It should be expected that political parties will act rationally to maximize their expected allotment of seats during the apportionment process. *See* Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation," and an Exegesis into the Judicial Role*, 78 Notre Dame L. Rev. 527, 543 (2003). Allowing plaintiffs to assume that, in a racially polarized jurisdiction, consideration of political affiliation always entails consideration of race would transform every reapportionment debate into a racial conflict.

In particular, one of the main difficulties in crafting a judicially manageable standard in political gerrymandering cases is that the question, "[h]ow much political motivation and effect is too much?" is unanswerable. *Vieth*, 541 U.S. at 296-97. But there should be no similar difficulty in racial gerrymandering cases, as the Constitution requires that all race-based governmental action be subjected to strict scrutiny. *Adarand*, 515 U.S. at 227. Any consideration of race is suspect, and it can only be permitted when it is narrowly tailored to further some compelling state interest. *Id.* Federal courts stand in the best position to separate race from legitimate

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[13] *See* How Groups Voted in 2012, Roper Center Public Opinion Archives, *available at* http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_12.html (last visited Oct. 10, 2014) (showing that 59 percent of white voters nationwide supported Republican Mitt Romney in the last presidential election, while 93 percent of African-Americans voted for Democrat President Obama).

considerations and to strictly scrutinize those situations in which a state legislature engaged in pernicious racial balancing. Courts need only conduct the same inquiry they are required to do in many other contexts, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) (describing the burden-shifting framework designed to root out impermissible discriminatory intent in employment decisions).

Although it may be difficult to prove that race and not partisanship motivated the majority caucus, it is precisely the function of the courts to make hard judgments regarding discriminatory intent. *See Arlington Heights*, 429 U.S. at 266. Rooting out the use of race in legislative redistricting is an important constitutional goal. Under *Shaw*, courts have given state legislatures too much deference and legitimized racial considerations as a key part of redistricting. Such deference is unwarranted in any other area of law and should not be tolerated in redistricting. *Cf. Fisher*, 133 S. Ct. at 2420 ("The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.").

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people." *Id.* at 2418 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). When a government entity uses race as a factor in an official decision, it presumptively violates the Equal Protection Clause. *Id.* at 2419. It then must prove that the use of race was narrowly tailored to further some compelling interest. *Id.* (citing *Grutter*, 539 U.S. at 326). Permitting states to consider

race in legislative reapportionment cases is inconsistent with constitutional ideals and general Equal Protection jurisprudence. This Court should subject race-based legislative redistricting decisions to the same exacting judicial scrutiny as every other type of racially motivated state action. The Court should extend *Shaw* to make clear that it applies to any consideration of race.

CONCLUSION

In these cases, Alabama was prohibited by federal law from acting in a race-neutral manner. Its redistricting was done under the preclearance regime in place before *Shelby County*. In order to satisfy its constitutional obligation to redistrict every ten years, and respect the constitutional requirement of one-person, one vote, it had no alternative other than to comply with the race-conscious decisionmaking required by Section 5 of the Voting Rights Act. On this limited basis, the judgment of the district court should be affirmed.

Although the era of Section 5 preclearance is now behind us, the conflict between the Equal Protection Clause and the Voting Rights Act in redistricting is just beginning. This Court has already confronted cases where a state has defended against an allegation of racial gerrymander by claiming that its use of race was required by Section 2. *See Shaw v. Hunt*, 517 U.S. at 914 (discussing North Carolina's assertion in defense to a racial gerrymandering suit "that failure to enact a plan with a second majority-black district would have left the State vulnerable to a lawsuit under [Section 2]"). Such a result is inevitable when Section

2 is interpreted as a disparate impact statute requiring racial balancing prohibited by the Equal Protection Clause. As in the context of Title VII, "the war between disparate impact and equal protection will be waged sooner or later." *Ricci v. DeStefano*, 557 U.S. 557, 595-96 (2009) (Scalia, J., concurring).

In the post-*Shelby County* era, states will continue to be placed in the impossible position of being required to comply with racial balancing statutes and the Equal Protection Clause simultaneously. "[T]his Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1634 (2014) (plurality opinion) (quoting *Shaw*, 509 U.S. at 647). If the Court finds that race-based redistricting should be subject to strict scrutiny in every case, it will soon have to confront the constitutionality of Section 2's vote-dilution prohibition. *See* O'Connor-Ratcliff, *supra*, at 71-74 (arguing that both Sections 2 and 5 of the Voting Rights Act are "probably unconstitutional" under the current Equal Protection jurisprudence because they would not satisfy the level of scrutiny applied in other race cases); Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate Racial Gerrymandering Cases*, 50 Stan. L. Rev. 779, 824-26 (1998) (arguing that one consequence of the interaction between Section 2, Section 5, and the racial gerrymandering cases is likely to be "heightened dominance of racial considerations in redistricting"). For now, however, the Court should

simply hold that all race-based official action must be subject to strict scrutiny.

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AMICUS CURIAE BRIEF

Nos. 13-895, 13-1138

In the
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL.,
Appellants,
v.
ALABAMA, ET AL.,
Appellees

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,
Appellants,
v.
ALABAMA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF OF THE SPEAKER OF THE ALABAMA HOUSE OF REPRESENTATIVES AND PRESIDENT PRO TEMPORE OF THE ALABAMA SENATE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

Amici curiae, the Speaker of the Alabama House of Representatives, Mike Hubbard, and the President Pro Tempore of the Alabama Senate, Del Marsh, are constitutionally-recognized presiding officers of their respective legislative chambers and were involved in passage of the redistricting plans at issue in this case. Through this brief, *amici* seek not only to represent the interests of their respective chambers in upholding the redistricting plans, but also in preserving fundamentally important principles of federalism regarding the essentially local function of redistricting.[1]

SUMMARY OF ARGUMENT

The district court correctly granted judgment in favor of the Appellees with regard to the challenges to the Alabama Legislature's 2012 redistricting plans. The district court's judgment takes proper account of the realities facing the Alabama Legislature at the time, including the historical context for the Legislature's enactment of the 2012 redistricting plans by addressing Alabama's difficult, but successful, efforts to provide equal access to the voting process and equal

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief.

participation by minorities in state government. The monumental task the 2012 Legislature faced in conforming the districts to the constitutional mandate of one person, one vote, is illustrated by the history of the Democrat-controlled Legislature's gross malapportionment of the districts in the 1993 and 2001 redistricting plans, as exposed by the 2010 Census.

In reality, the Appellants' challenge to the redistricting plans is a naked political dispute raised in response to the dramatic realignment of political power in Alabama during the last two decades. In rejecting such politically-based arguments and in focusing only on the relevant facts, the district court maintained a proper respect for the important, guiding principles of federalism often emphasized by this Court in redistricting matters. As the district court did here, when reviewing legislative redistricting enactments courts should exercise caution and accord a presumption of good faith in the absence of a plainly-demonstrable violation of federal constitutional and statutory principles.

ARGUMENT

I. Alabama Has Thrown Off the Heavy Yoke of Its Discriminatory Past.

A brief review of Alabama's arduous journey on the road to providing equal access to the voting process and equal participation by minorities in state government provides important context and illuminates the Alabama Legislature's motivations for enacting the challenged redistricting plans, *see* 2012 Ala. Acts No. 602

(House Plan) and No. 603 (Senate Plan). As set forth below, that motive was, above all, to ensure fairness and equal representation pursuant to the bedrock constitutional principle of "one person, one vote."

Much ink has been spilled in recounting Alabama's tragic history during the early civil rights era. As it engaged in the 2012 redistricting process, the first Republican-controlled Legislature since Reconstruction was burdened by Alabama's tumultuous history of systemic and invidious discrimination indelibly printed on the culture of its state government and citizenry. When Congress applied Section 5's preclearance mechanism to Alabama in 1965, the State had dismally low black voter registration and turnout rates, and regularly witnessed elections characterized by overt appeals to race. Less than 20% of eligible black voters were registered to vote, whereas over 70% of eligible white voters were registered to vote. *See* H.R. Rep. No. 89-439, at 5; S. Rep. No. 94-295, at 6 (1975); *see also Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2624 (2013) (noting that "[s]hortly before enactment of the Voting Rights Act, only 19.4 percent of African-Americans of voting age were registered to vote in Alabama. . . . .") (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966)).

Minority participation in state government was likewise nonexistent. White Democrats dominated and controlled the Legislature.[2] In the summer of 1970,

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[2] Just four years before the infamous civil rights march in the City of Selma across the Edmund Pettus Bridge on "Bloody Sunday," March 7, 1965, only 156 of 15,000 voting-age blacks in Lowndes County were registered to vote. *See* H.R. Rep. No. 89-439, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441. Today, Selma is

when the state Democratic Party nominated George Wallace, Alabama did not have a single black legislator. *See* Charles S. Bullock, III & Richard Keith Gaddie, *An Assessment of Voting Rights Progress in Alabama* tbl.5 (Am. Enter. Inst. 2005), *available at* http://www.aei.org/files/ 2006/05/05_VRAAAlabama-study.pdf (hereinafter, "Bullock & Gaddie"). During this same time, the Department of Justice sued multiple state agencies for systemic employment discrimination, as blacks representing 25% of Alabama's population held only 3.1% of state merit systems positions. *See United States v. Frazer*, 317 F. Supp. 1079, 1086-87 (M.D. Ala. 1970).

At first, Alabama was a reluctant traveler on the journey towards equal access and participation for minorities. Other covered states likewise progressed unhurriedly, compelling Congress to renew Section 5 in 1970, 1975 and 1982. As this Court stated, Alabama was one of those states all too "familiar to Congress" in 1965 as a "geographic area[] where immediate" and extraordinary action was "necessary." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). Like an enormous freighter, Alabama moved slowly but inexorably toward reform following the 1982 reauthorization of Section 5.

Under the watchful eye of the Department of Justice, Alabama began to right the ship in the late 1980s and 1990s. By 2000, blacks had closed the voter registration and turnout gaps. *See* Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the*

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governed by an African-American mayor. *Shelby Cnty.*, 133 S. Ct. at 2626.

Voting Rights Act (Am. Enter. Inst. 2006), *available at* http://bdgrdemocracy.files.wordpress.com/2012/02/20060515_blumcampbellreport-vra-gaddie.pdf. In every year since 1990, blacks have registered and voted in larger percentages in Alabama than in states outside the South. *See* Bullock & Gaddie, *supra*, tbls. 2 & 3; Voting Rights Act: the Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 44-45 (2005) (statement of Ronald Gaddie). When Congress renewed and amended Section 5 in 2006, there were no gaps. As this Court recently acknowledged in *Shelby County, Ala. v. Holder*, "[v]oter turnout and registration rates now approach parity," "minority candidates hold office at unprecedented levels," and "[t]he tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years." 133 S. Ct. at 2621, 2625 (internal quotations omitted).

The widespread disenfranchisement that characterized Alabama during the early civil rights era has long vanished. Black voters are now more likely to register and politically mobilize in active support of candidates.[3] *Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1286 (M.D. Ala. 2013) ("*ALBC*"). In fact, in the 2004, 2008 and 2012 general elections, Alabama black voter participation exceeded white voter participation. *See* S. Rep. No. 109-295, at 11 (July 26, 2006); Bullock & Gaddie, *supra*, tbl.3; *Voting and Registration in the Election of November 2008*, U.S. CENSUS BUREAU tbl.4b, *available at*

[3] The Court recently discussed these marked improvements in black voter registration and participation in *Shelby County*, 133 S. Ct. at 2625-26.

http://www.census.gov.hhes/www/socdemo/voting/publications/p20/2008/ tables.html; *Voting and Registration in the Election of November 2012*, U.S. CENSUS BUREAU tbl.4b, available at http://www.censusgov/hhes/www/socdemo/voting/publications/p20/2012/tables.html. In the 2012 general election, black voter participation exceeded white vote participation by 4% (66.2% v. 62.2%). *Voting and Registration in the Election of November 2012*, *supra*, tbl.4b.

As this Court noted in *Shelby County*, "history did not end in 1965." 133 S. Ct. at 2628. In contrast to the early days of the Civil Rights Act, the Alabama of today is no longer the defiant Alabama of water cannons, police dogs and voter intimidation; rather, it has joined the community of states providing equal access to the voting process and equal participation by minorities in state government. The electoral results of the last two decades reflect this progress. Since 1993, black voters have successfully elected candidates of their choice in majority-black districts. *ALBC*, 989 F. Supp. 2d at 1286. Currently, black members of the Democratic Party represent 26 of 27 majority-black House districts and 7 of 8 majority-black Senate districts. The number of majority-black Alabama House and Senate districts is roughly proportional to the black voting-age population in Alabama. Under the challenged Acts, 22.86% and 26.67% of the Senate and House districts, respectively, are majority-black districts and are populated by roughly the same percentages of Alabama's black population as in the 1993 and 2001 plans. *Id.* at 1253. By 2006, the number of black elected officials in Alabama had increased almost 500%, from 161 to 756. Bullock & Gaddie, *supra*, tbl.4.

This dramatic transformation is further evidenced by a record devoid of any evidence of overt, invidiously discriminatory voting rights violations or campaigns laced with appeals to offensive racial stereotypes. Long gone are literacy and knowledge-of-government tests and other cynical mechanisms of electoral gamesmanship used to deny black Alabamians their franchise and proper representation in state government. Moreover, it is undisputed that the Department of Justice has not objected to a single statewide preclearance submission in more than 17 years.[4] In fact, in the decade preceding Congress's renewal of Section 5 in 2006, the DOJ objected to only 0.06% of preclearance submissions from all levels of government in Alabama. *Id.*

Not only did black representation greatly increase in state government during the 1990s through the present, but also equal employment opportunities in merit systems positions across state agencies increased dramatically. By 2003, "African-Americans constituted 39% of Alabama's government workforce, a figure more than 10 percentage points greater than their representation in the general population." *United States v. Flowers*, 444 F. Supp. 2d 1192, 1193 (M.D. Ala. 2006) (known as "*Frazer/Flowers*"). Based on this progress, the Department of Justice agreed to the dissolution of all outstanding injunctive orders entered in *Frazer/Flowers*, explaining that the injunction was no longer appropriate

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[4] Minority registration and voting levels, minority participation in government and preclearance submissions and DOJ objections serve as guideposts in assessing progress of states covered by the Voting Rights Act. *See City of Rome v. United States*, 446 U.S. 156, 180-181 (1980).

because "the racial make-up of Alabama's government [wa]s dramatically different from what it was in 1970."[5] *Id.*; *see also* 11/20/2012 Order, *United States v. Director of the Ala. Dep't of Personnel, et al.*, Case No. 2:68-cv-02709 (M.D. Ala. 2012). The same district court allowed a 12-year consent decree to expire in December 2006 in a related class action brought on behalf of black merit system employees and applicants challenging racially discriminatory employment practices by the Alabama Department of Transportation. *See Reynolds v. Ala. Dep't of Transp.*, No. 2:85cv665-MHT, 2006 WL 3924790 (M.D. Ala. 2006). That court also decertified a related class action against 27 state agencies for alleged racially discriminatory employment practices. *See* 11/30/2009 Order, *In re Employment Discrim. Litig. Against the State of Alabama, Eugene Crum, Jr., et al. v. State of Ala., et al.*, No. CV-94-T-356-N (M.D. Ala. 2009).

The record established in the court below reveals a State that has thrown off the heavy yoke of its discriminatory past and that has achieved substantial progress in the area of civil rights. It is no longer a state characterized by "concerted acts of violence, terror and subterfuge in order to keep minorities from voting." *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 197, 226 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part.). In fact, this Court recently invalidated Section 4(b)'s coverage

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[5] The *Frazer/Flowers* injunctive orders set out an extensive remedial framework to redress discrimination. The district court also terminated various provisions of the *Frazer/Flowers* consent decree in 2005 and 2006. *See United States v. Flowers*, 444 F. Supp. 2d 1182 (M.D. Ala. 2006) (*Flowers II*); *United States v. Flowers*, 372 F. Supp. 2d 1319 (M.D. Ala. 2005) (*Flowers I*).

formula in *Shelby County, Alabama v. Holder*, based in part on Alabama's sustained level of progress. 133 S. Ct. 2612 (2013). The "blight of racial discrimination in voting" that "infected the electoral process" is no more. *Katzenbach*, 383 U.S. at 308.[6]

In every material respect, the Alabama of today is significantly different from the defiant and unrepentant Alabama of previous decades. Alabama does not claim to have successfully rooted out every last vestige of racial discrimination; like many states, Alabama still grapples with these issues in 2014. Any claim that Alabama remains a permanent prisoner of its tragic past, however, is unsupported by the record.

Cognizant of Alabama's turbulent civil rights history, the 2012 Legislature undertook significant,

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[6] As evidence of alleged "racial cleavage" in Alabama, the NAACP points to unsuccessful voter referenda in 2003 and 2004 to remove the remnants of Jim Crow provisions, including invalidated poll tax language, from the Alabama Constitution. NAACP Br. at 10. Yet when the Republican-controlled legislature passed similar legislation in 2012, Alabama Democrat party leaders, including ADC Chairman Joe Reed and Senator Hank Sanders, vocally and publically opposed the amendment, calling it "a hoax on the people of Alabama" and a "wolf in sheep's clothing." *See* Debbie Elliot, *Ala. Racist Language Draws Unexpected Foes*, NAT'L PUB. RADIO (Nov. 1, 2012, 12:38 PM), http://www.npr.org/2012/11/02/164107184/ala-racist-language-measure-draws-unexpected-foes; Kim Chandler, *Black lawmakers, AEA urge voters to reject amendment taking Jim Crow language out of Alabama Constitution*, AL.COM (Oct. 19, 2012), http://blog.al.com/spotnews/2012/10/black_lawmakers_urge_voters_to.html. Furthermore, to be clear, the failure of the referenda had nothing to do with the desire of Alabama citizens to remove racist language from the Alabama Constitution, but rather they failed due to an ancillary fight regarding the alleged effect of the referenda on education funding. *Id.*

additional steps to ensure a fair, race-neutral redistricting process based on the overriding constitutional principle of "one person, one vote" to correct two decades of intentional and severe malapportionment by Democrat-controlled legislatures.

II. A History of Gross Malapportionment of Districts by Democrat-Controlled Legislatures, and Not Issues of Race, Greatly Affected Creation of the Challenged Plans.

A. *The Democrat-controlled Legislature created significantly malapportioned districts in 1993 and 2001.*

A review of Alabama's 1993 and 2001 redistricting plans is also crucial to a proper understanding of how and why the Legislature drew the districts approved by the 2012 Acts. The lasting effect of those plans compellingly establishes that race was not the primary factor affecting the Legislature's creation of the 2012 plans, but rather correcting the severe and systematic malapportionment of districts by previous Democrat-controlled Legislatures.

For 136 consecutive years following Reconstruction, the State Democratic Party controlled both houses of the Alabama Legislature and, beginning in 1993, began drawing districts to protect those majorities. Under the 1993 and 2001 plans, the Democrat-controlled Legislature used a population deviation number of 10% (±5%) to "systematically underpopulate[] majority-black districts at the expense of majority-white districts that the Legislature, in turn, overpopulated." *ALBC*, 989 F. Supp. 2d at 1294-95. As

noted by the United States, "[t]he malapportionment was particularly severe in Alabama's majority-black districts, all of which were under populated." U.S. Br. at 4. The Democrats began this pattern of malapportionment with the creation of the Reed-Buskey plans in 1993, when they proposed, and a state court approved, 27 majority-black districts, of which 25 were underpopulated by more than 4%. *ALBC*, 989 F. Supp. 2d at 1242. The Reed-Buskey plan also underpopulated all eight majority-black Senate districts, six of them by more than 4%. *Id.*

This trend continued following the 2000 Census. As acknowledged by the United States, the Democrat-controlled legislature "had generally underpopulated majority-black districts and overpopulated nearby majority-white districts." U.S. Br. at 4-5. The district court found, "the districts established in 2001 were severely malapportioned in the light of the population data from the 2010 Census. . . ." *ALBC*, 989 F. Supp. 2d at 1241. The Democrat-controlled Legislature systematically underpopulated majority-black House districts and overpopulated adjacent predominantly white districts as part of their self-described successful partisan gerrymander in 2001.[7] In the 2001 plans, 22 of 27 majority-black House districts were underpopulated by more than 5%, and six of eight majority-black Senate districts were underpopulated, with four of those

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[7] As noted by the district court, State Democratic Party leaders filed, as *amici curiae*, a brief in this Court citing the 2001 districts as an example of a successful partisan gerrymander. *ALBC*, 989 F. Supp. 2d at 1243-44 (citing Brief for Leadership of the Alabama Senate and House of Representatives: Lowell Barron, et al. as Amicus Curiae Supporting Appellees, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580)).

districts underpopulated by more than 4%. *Id.* at 1242. The resulting malapportionment was manifest in the 2002 General Election results. Then, the Democrat leadership openly bragged that in 2002, with just 51% of the statewide vote, the Democratic Party controlled 71% of the Senate seats and 60% of the House seats. *Id.* at 1244.

During this same time period, Alabama underwent a significant realignment of political power. Republicans began winning presidential and statewide elections with increasing frequency. Additionally, despite the Democrats' overtly-partisan 2001 gerrymander, Republicans won a supermajority in both houses of the Legislature in 2010. By 2012, not one Democrat occupied a state-wide elected office. As set out more fully below, *see* discussion *infra* § III, this wholesale realignment of political power in Alabama is *the* motivating factor in this litigation.

B. *The 2010 census exposed the gross malapportionment the Democrat-controlled Legislature created in its 1993 and 2001 plans.*

New data from the 2010 Census dramatically exposed the gross malapportionment of Alabama's existing districts, revealing that the population in 80 of the 105 Alabama House districts deviated from the ideal population by more than 5%, of which 22 districts deviated above or below the ideal population by more than 20%. *Id.* at 1241. District 41, a majority-white House district in Shelby County, was overpopulated by 60.76%. *Id.* Six other white majority districts were overpopulated by 21.65 to 42.68%. *Id.* In contrast, the

2010 Census also revealed that nine of the 27 majority-black House districts were underpopulated by more than 20%, and that all 27 majority-black districts in the House were underpopulated by more than 5%, the maximum deviation used under the 2001 plan. *Id.*

The Senate districts were no better. According to the 2010 Census, 24 of 35 districts deviated from the ideal population by more than 5%, of which four districts deviated by more than 20%. *Id.* Four white-majority districts were overpopulated between 15.09 and 31.12%. *Id.* at 1242. The malapportionment was especially significant in the majority-black Senate districts. Seven of the eight majority-black Senate districts were underpopulated by more than 10%, and two of those districts were underpopulated by more than 20%. *Id.* at 1241. Plaintiffs' expert, William Cooper, acknowledged that the Legislature needed to make *significant changes* to district lines because of the severe malapportionment of the existing districts. *Id.* at 1271.

This bulwark of systematic, persistent and gross malapportionment by the Democrat-controlled Legislature was the state of affairs when the 2012 Legislature set out to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).[8] Facing this monumental challenge, the Legislature's goal, "[a]bove all," was "to correct the

[8] The dissenting district judge ignores the 20-year pattern of gross malapportionment wrought by Democrat-controlled Legislature, choosing instead to discount the thorny challenges the Democrats created with their overtly partisan gerrymanders.

severe malapportionment," creating "more equality among districts throughout the State[,]" in order "to comply with the constitutional mandate of one person, one vote." *ALBC*, 989 F. Supp. 2d at 1294, 1296-97. At the same time, the Legislature was facing a more stringent preclearance standard under the 2006 amendment to Section 5.[9] *Shelby Cnty.*, 133 S. Ct. at 2621 (noting that in 2006, Congress extended the operation of Section 5 and amended its text "to prohibit more conduct than before").

As the dissenting district judge's opinion illustrates, failure to consider the Democrat-controlled Legislatures' prolonged history of political chicanery and the resulting significant malapportionment of the districts offers a severely skewed recitation of the facts and one that ignores the Legislature's paramount concern: creating districts that satisfy the constitutional principle of "one person, one vote." Context matters, however, because it is this past that illuminates the present.

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[9] Congress added subsections (b) through (d) to Section 5 to prohibit "[a]ny" voting change that "has the purpose of or will have the effect of diminishing the ability of any" voter "on account of race or color . . . to elect their preferred candidates of choice" and stated that the purpose of that new language was "to protect the ability of such [voters] to elect their preferred candidates of choice." Voting Rights Act § 5, 42 U.S.C. § 1973c.

III. This Is a Political Dispute Masquerading as a Legal Controversy.

A. *There has been a dramatic political realignment in Alabama.*

This case is not about race or even civil rights issues generally; rather it is about the Alabama Democratic Party's loss of 136 years of uninterrupted legislative power. As their party affiliation rapidly declined, Democratic Party leaders pulled out all the stops in 2001 to create what they publicly touted as the perfect political gerrymander. Those redistricting plans ran directly into a brick wall of political realignment, as the Democratic Party began suffering consistent election losses in both state and federal elections.

Between 1875 and 1987, no Republican served as Governor. Since 1987, a Republican has held the Governor's office for 21 of the last 27 years. In 1994, no Republican served on the Supreme Court of Alabama. In contrast, no Democrat has served on the court since 2011. Four decades ago, not one Republican held a statewide elected executive branch office. Now, not one Democrat holds a statewide executive branch elected office. In 2009, the Democrat Party controlled both houses of the Alabama Legislature with healthy majorities of 60 of 95 House seats and 20 of 35 Senate seats. In 2010, Republicans won supermajorities in both houses of the Legislature, winning 22 of 35 Senate seats and 65 of 95 House seats, and they did so using the same gerrymandered districts the Democrat-controlled Legislature created in 2001. This single election cycle ended 136 uninterrupted years of Democratic Party control of both houses of the Legislature.

The outcome in federal elections mirrors Republican successes in state elections. From 1877 to 1980, no Republican served as an Alabama U.S. Senator. Republicans now have held both U.S. Senate seats since 1996. In 1991, Democrats held five of the seven U.S. House seats. Now, Republicans hold six of the seven U.S. House seats. No Democratic presidential candidate has prevailed in Alabama since Jimmy Carter. Thus, in just two decades, there has been a dramatic change in the body politic of Alabama.

This rapid loss of political influence drove the Alabama Democratic Conference and the Alabama Legislative Black Caucus to file their lawsuits in one last desperate attempt to hold on to the artificial advantage they created through their severely malapportioned districts in 1993 and 2001. Politics, and not civil rights, is the wellspring of their lawsuits; Appellants simply want the Court to redraw the districts to shield them from their significant losses and to enshrine the unfair advantage created through earlier partisan gerrymanders.

B. *The record establishes the political nature of the Appellants' challenge.*

The record compellingly reveals the naked political character of this dispute. For example, rather than offer evidence that race motivated the Republican-controlled Legislature to unfairly draw the districts in 2012, the record is rife with testimony by Democrat representatives lamenting their loss of political power and status. Principal among their complaints is the Republicans' frequent use of cloture votes to shut off debate and to vote on legislation that the Democrats strongly oppose, *e.g.*, the 2013 Alabama Accountability

Act.[10] One Democrat representative (Representative Laura Hall) lamented that she had been "clotured more during this last quadrennium than the entire 20 years [she had] been in session." *ALBC*, 989 F. Supp. at 1265. Of course, her testimony is not surprising given that her party retained control of the Alabama House of Representatives for the preceding 136 years until 2010. Another Democrat representative, Senator Quinton Ross, testified that the Republican supermajority had "abused its power" by adopting legislative procedures to pass bills opposed by his party. *Id.* at 1263. Others complained about the loss of their ability to adequately represent their districts in light of their minority status and the inability to engage in debate and offer legislative amendments in the manner they previously had done as members of the majority party. *Id.* at 1262-63. As the district court found, however, these complaints are the natural consequences of losing elections; that "the decision to invoke the rule of cloture to pass legislation being filibustered by a minority party is not an invidiously discriminatory tactic." *Id.* at 1260.

Other facts establish that this lawsuit is merely political sour grapes. As cogently described by the district court, the Plaintiffs offer a "heads I win, tails you lose" argument. *Id.* at 1303. They complain about a loss of power and the rise of allegedly-oppressive Republican supermajorities that occurred under their watch *and*

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[10] Passage of the Accountability Act of 2013 was a particularly sore subject for the Democratic Party. The Act, which an Alabama teachers' union (the Alabama Education Association) vehemently opposed, created a scholarship program to provide tuition and other assistance to enable K-12 students to escape chronically-failing public schools.

using their gerrymandered district maps. Now that the Republicans are in charge, Democrats claim that simply maintaining the relative black populations in majority-black districts they created is discriminatory because it overpopulates those districts and dilutes the black vote.[11] It takes a brass neck to make this argument. The Democrat-controlled Legislature did the same thing in 2001 after the 2000 Census revealed that majority-black districts were substantially under-populated. It redrew the districts by shifting more black voters into the majority-black districts, while carefully maintaining the same relative black populations of 60% in each district.

Second, several black elected officials and Democratic Party leaders conceded at trial that they had recommended that the Legislature maintain existing majority-black districts with black populations of 60 to 65%, claiming that the population statistics were much higher than the actual voters in the district.[12] *ALBC*, F.

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[11] The Democrats, who now claim that the Republicans have exercised their authority in an unfair manner, have very short memories regarding their own tactics. For example, in 1998, after Steve Windom became the first Republican to win the Lieutenant Governor seat since 1874, the Democrat-controlled Senate voted to strip the Lieutenant Governor of the power to make committee assignments and direct the flow of legislation. *See* David Firestone, *In Alabama, Senate Ends Bitter Rift Over Leader*, N.Y. Times, Mar. 31, 1999, *available at* http://www.nytimes.com/1999/03/31/us/in-alabama-senate-ends-bitter-rift-over-leader.html.

[12] Although now claiming racial unfairness, black Democrat Senator Hank Sanders recommended during public hearings that the black population of majority-black districts be maintained at 62%, and black Representative Tom Jackson asked that the black population of his majority-black district be maintained at 62 to 65%. *ALBC*, 989 F. Supp. 2d at 1246. Joe Reed, chairman of the Alabama Democratic Conference since 1970 and designer of several

Supp. 2d at 1246, 1266, 1302. Third, the Democratic Conference's expert previously testified in another Alabama case that even a 61% majority-black district could not guarantee black voters could elect the candidate of their choice and that no clear minimum could be set to determine across jurisdictions what voting-age population is necessary to provide a minority group the opportunity to elect its candidate of choice. *Id.* at 1272, 1303.

In addition, the Legislative Black Caucus and Democratic Conference plaintiffs cynically attack large portions of the maps they proposed and that the Permanent Legislative Committee on Reapportionment accepted. For example, the Committee incorporated substantial portions of the Montgomery County House district maps Representative Thad McClammy submitted. *Id.* at 1248, 1275, 1302. McClammy, a black Democrat, proposed the district map as a "consensus map" created by black representatives serving in Montgomery House districts. *Id.* at 1248. Notably, McClammy's proposed map also moved House District 73 to Shelby County, about which Plaintiffs now complain. *Id.*

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redistricting plans in Alabama, recommended maintaining black populations of majority-black districts at 60 to 65%. *Id.* at 1266, 1302. Senator Dial, a former Democrat and co-chairperson of the Reapportionment Committee, provided undisputed testimony that no member who represented a majority-black Senate district ever asked for a district with a black population of only 55% and that, in fact, black Senators would have rejected any proposal to populate majority-black districts at a 55% level. *Id.* at 1275. The record contains no evidence of any consensus as to the minimum black population necessary for a majority-black district to elect a candidate of its choice.

Senator Roger Smitherman, a black Democrat, acknowledged that he submitted a map for the majority-black districts in Jefferson County (Birmingham) to the Committee on Reapportionment co-chairperson Senator Dial; that he asked Dial to maintain a similar racial balance as the previous districts, which Dial agreed to do as long as it did not result in retrogression in other districts; and that Dial adopted a substantial majority of Smitherman's proposed map. *Id.* at 1261, 1274. The Committee also deferred to the requests of black Democrat Senator Vivian Figures, as well as other members of the Mobile legislative delegation not to create a new district in Mobile.[13] *Id.* at 1274-75. Another black Democrat, Senator Hank Sanders, wanted to gain minority members from a bordering district and give up population in Autauga County, which Senator Dial partially accommodated. *Id.* The Committee on Reapportionment further accommodated requests for changes to the final plans made by several Democratic representatives who wanted to swap precincts in the Birmingham area and others who made requests regarding a shared district border in northwest Alabama. *Id.* at 1252. The fact that they now attack the districts they helped create further exposes their political skullduggery.[14]

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[13] Senator Figure's lament regarding the loss of political power as a member of the minority party should fall on deaf ears. As the district court found, Figures had no problem voting for the Democrats' deliberate partisan gerrymander and for majority-black districts with similar percentages of black voters in 2001. *ALBC*, F. Supp. 2d at 1302.

[14] The Republican-controlled Legislature not only used the same procedures adopted by the Democrat-controlled Legislature in 2001, but also it improved on those procedures. For example, whereas the

Other facts similarly give away the political nature of the Democrats' challenge. For example, the votes on the 2012 plans were straight-party votes in both houses, and not votes on racial lines. Moreover, the results of the 2012 plans are contrary to any claim that the plans were drawn to harm black voter interests through packing. The House plan actually added a new majority-black district (for a total of 28); slightly increased the black population for 14 majority-black House districts, while slightly decreasing the black population of 13 majority-black House districts; and slightly increased the black population in five of eight majority-black Senate districts, while slightly decreasing the black population of the remaining three majority-black Senate districts – hardly the stuff of a packing case. *Id.* at 1253.

Moreover, the Democratic Conference's expert conceded at trial that if the Republican-controlled Legislature had intended to pack black voters into majority-black districts, it could have systematically overpopulated all of the majority-black districts, which the 2012 Acts did not do. *Id.* at. 1272.[15] In fact, the 2012

2001 Reapportionment Committee held its hearings on their 2001 plans *after* the Legislature passed the plans, the 2012 Committee solicited public comments before drafting the plans. *ALBC*, 989 F. Supp. 2d at 1246. The 2012 Committee also held more public hearings than in 2001. *Id.* at 1289. Moreover, the Legislature considered and voted on the 2012 plans in a Special Session dedicated solely to redistricting. *Id.* at 1258, 1275.

[15] More specifically, the Republican-controlled Legislature, using a ±1% population deviation guideline, could have maximized its partisan advantage by overpopulating majority-black districts by 2%, while underpopulating adjacent majority-white districts by 2%.

Legislature did the opposite, limiting its ability to draw the district lines (even for partisan gerrymandering) by adopting a ±1% population deviation guideline to ensure greater population equality. The Legislature also slightly underpopulated the overwhelming majority of majority-black districts. Even under the 2012 Acts, 21 of 28 majority black House districts and six of the eight majority-black Senate districts remain underpopulated, which is contrary to any allegation of packing.

Particularly telling is the fact that neither group of plaintiffs (nor the dissenting district judge) offer any alternative plan (or even plans for the Madison, Jefferson and Montgomery County districts) that would have added another majority-black House or Senate district as a part of a state-wide plan with 60% or more black voters in those districts that would satisfy the constitutional mandate of one person, one vote under the Equal Protection Clause of the Fourteenth Amendment while using an overall deviation in population of ±1%. *Id.* at 1264, 1266-67. All of these facts supported the Department of Justice's preclearance decision and demonstrate that race was not the primary motivating factor in the creation of the 2012 plans; that the plans "d[id] not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Section 5, 42 U.S.C. § 1973c.

In sum, this action is "a political dispute masquerading as a legal controversy." *ALBC*, 989 F. Supp. 2d at 1236. The State Democratic Party apparatus, its power rapidly waning, asks the Court to intervene and redraw the districts to protect their dwindling political interests. The Court should decline

that invitation.[16] As stated by the district court, the Voting Rights Act and the Fourteenth and Fifteenth Amendments do not mandate a "Democratic candidate Protection Program." *Id.* at 1303 (quoting Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 223 (2007)). Nor should the Court allow civil rights laws to be used to settle political scores.

IV. The District Court's Decision Properly Balances the Need for Judicial Review With Preservation of Important Principles of Federalism.

The district court's correct decision also protects the important – but sometimes forgotten – federalism interests present in any review of a state legislature's redistricting plan. As is clear in its exhaustive, detailed opinion, the district court had a proper respect for all of the facts and difficult circumstances facing the Alabama Legislature during its redistricting deliberations.

As this Court has made clear, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well

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[16] At the same time it was losing political clout, the Alabama Democratic Party was facing an organizational and financial crisis. *See* Charles J. Dean, *The Alabama Democratic Party: Almost Bankrupt and its Executive Board Still Doubles Its Travel Budget*, AL.COM (April 11, 2013), http://blog.al.com/wire/2013/04/the_alabama_ democratic_party_a.html. Furthermore, intra-party squabbles resulted in a party split and the creation of the Alabama Democratic Majority. *See* Charles J. Dean, *The Alabama Democratic Party: 'We're Broke, Broke, Broke,'* AL.COM (May 12, 2013), http://blog.al.com/wire/2013/05/the_alabama_democratic_ party_w.html.

settled that 'reapportionment is primarily the duty and responsibility of the State.'" *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *see also Growe v. Emison*, 507 U.S. 25, 34 (1993) (stating that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts"); *White v. Weiser*, 412 U.S. 783, 795 (1973) ("We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment.") (citing numerous cases). Of course, true, plainly-demonstrable violations of the federal constitutional and statutory principles at issue here have a proper judicial remedy which can and should be pursued with vigor. This Court has explained, however, that a state legislature's balancing of the many considerations inherent in the redistricting process should be judicially re-weighed with restraint and caution:

> Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed. The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to

> make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.

Miller, 515 U.S. at 915-16 (citations omitted); *see also Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (noting that "redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment," and that courts should be careful so as to not "displac[e] legitimate state policy judgments with the court's own preferences"); *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."); *White*, 412 U.S. at 794-95 ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.'") (quoting *Reynolds*, 377 U.S. at 533); *see, e.g., Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, at *7 (N.D. Ga. May 16, 2006) (noting that, "as the Supreme Court has repeatedly advised, caution is the *sine qua non* of judicial scrutiny of districting legislation").

Accordingly, this Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978) (citing cases); *see also White*, 412 U.S. at 795 (directing that, in evaluating redistricting plans, a federal district court "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'") (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). Stated another way, a reviewing court should strike down a state legislature's considered redistricting plan only where the plan is plainly out-of-step with relevant statutory or constitutional strictures. Otherwise, courts can be too easily overextended into what Justice Frankfurter famously called the "political thicket" of redistricting, *Colegrove v. Green*, 328 U.S. 549, 556 (1946), by plaintiffs – such as the plaintiffs in this case – who are simply attempting to avoid the consequences of political losses (*i.e.*, elections).[17]

Even a cursory review of the district court's detailed opinion shows that the court faithfully applied

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[17] As one jurist recently put it:

> Faced with entreaties by litigants seeking judicial intervention in the redistricting process, Justice Frankfurter famously warned that "[c]ourts ought not to enter this political thicket." Although the law has not adopted the uncompromising version of this principle urged by Justice Frankfurter, his admonition continues to resonate each decade when courts are asked to decide what are fundamentally *political* disputes.

Vandermost v. Bowen, 269 P.3d 446, 485 (Cal. 2012) (Liu, J., concurring) (citations omitted; emphasis in original).

these well-established principles in this case, and in so doing properly protected the important federalism concerns raised in any redistricting dispute. Indeed, the record supports the reasonableness of the redistricting plans in this case, which were the end product of what is a very difficult task for any state legislator – a task that certainly requires "discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915. In this case, the legislators involved in creating the plans had to balance, among other things: (1) the fundamental constitutional principle of "one person, one vote"; (2) the principle of non-retrogression under the Voting Rights Act; (3) the concern to avoid incumbent conflicts; (4) the concern to preserve communities if possible; (5) the various personal (and not always reconcilable) preferences and desired accommodations of the various senators and representatives[18]; and (6) the preferences and concerns received in public hearings. Legislators who reasonably exercise their discretion in balancing these matters – as the record shows was the case here – should have some confidence that those balanced decisions will not be

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[18] As is discussed at various points above and as the district court's opinion illustrates, the record shows that the leadership of the Reapportionment Committee (Senator Gerald Dial and Representative Jim McClendon), and their consultant Randolph Hinaman, took great lengths to consider and accommodate the desires of the members of both houses, including Democratic members. *See, e.g.*, *ALBC*, F. Supp. 2d at 1273-78. Senator Dial testified that he was motivated in large part by a desire to make the redistricting process "more transparent and involve more people into it," because, in his opinion, there had been a substantial lack of transparency and involvement allowed during the 2001 Democrat-led redistricting (done when he was a Democrat). *See* Trial Trans. at Vol. 1, pp. 26-27.

easily undone through the courts by political opponents who merely seek to again wield power that the *state citizenry* has since denied them.

Rather than get distracted by what is in reality a fairly transparent political dispute (as discussed above), the district court focused on the lack of evidence that the Alabama Legislature's redistricting plan in any way violated federal law. The district court's properly-focused and properly-balanced approach should be affirmed.

CONCLUSION

Amici respectfully submit that the judgment of the district court was correct and should be affirmed.

Respectfully submitted,

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